

# Boston College Journal of Law & Social Justice

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Volume 32 | Issue 1

Article 4

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January 2012

## Separation, Deportation, Termination

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### Recommended Citation

Marcia Yablon-Zug, *Separation, Deportation, Termination*, 32 B.C.J.L. & Soc. Just. (2012), <http://lawdigitalcommons.bc.edu/jlsj/vol32/iss1/4>

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# SEPARATION, DEPORTATION, TERMINATION

MARCIA YABLON-ZUG\*

**Abstract:** There is a growing practice of separating immigrant children from their deportable parents. Parental fitness is no longer the standard with regard to undocumented immigrant parents. Increasingly, fit undocumented parents must convince courts and welfare agencies that continuing or resuming parental custody is in their child's best interest. This requirement is unique to immigrant parents and can have a disastrous impact on their ability to retain custody of their children. Best interest decisions are highly subjective and courts and agencies increasingly base their custody determinations on subjective criteria such as negative perceptions regarding undocumented immigrants and their countries of origin, and on extremely positive beliefs regarding the benefits of an American upbringing. For undocumented parents facing deportation, this is a disastrous combination. Courts and agencies frequently conclude that allowing a child to leave with a deported parent, return to a foreign country, and forgo childhood in the United States is not in the child's best interest. Replacing the parental rights standard with a best interest of the child standard in the context of undocumented immigrant families is the latest example of the increasing power of the children's rights movement. This, however, is a drastic change and one that must receive considerable attention and consideration before it is permitted to continue.

## INTRODUCTION

On a Tuesday afternoon in late September of 2009, Maria Gurrola was caring for her newborn son.<sup>1</sup> She had just returned home from running errands when a black police style sedan pulled up in front of

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<sup>1</sup> See Gabriel Falcon, *Update: Amber Alert for Abducted Newborn*, ANDERSON COOPER 360° CNN BLOG, (Sept. 30, 2009, 10:37 AM), <http://ac360.blogs.cnn.com/2009/09/30/update-amber-alert-for-abducted-newborn>.

her house. A blonde woman exited the car and knocked on Gurrolla's door. The woman falsely identified herself as an immigration official and then demanded Gurrolla's baby. When Gurrolla refused, the woman stabbed her eight times and abducted her child.<sup>2</sup>

Gurrolla survived, and shortly after the abduction police located the woman and returned the baby.<sup>3</sup> Just moments after being reunited with his mother, however, the state took the baby and his siblings into custody based on allegations that a family member had attempted to sell the child.<sup>4</sup> The allegations were unfounded, and eventually, the family reunited.<sup>5</sup>

Maria Gurrolla's son was taken twice, first by a kidnapper and then by the state.<sup>6</sup> Perhaps more than anything else, it is the combination of

<sup>2</sup> See *id.*; Kristin M. Hall & Desiree Hunter, *Kidnapped Baby Found: State Reunites Mother and Child, Then Takes Custody ff Kids*, HUFFINGTON POST (Oct. 4, 2009, 2:58 AM), [http://www.huffingtonpost.com/2009/10/04/kidnapped-baby-found-stat\\_n\\_308936.html](http://www.huffingtonpost.com/2009/10/04/kidnapped-baby-found-stat_n_308936.html).

<sup>3</sup> *Baby Snatch Victim Loses Kids to State Custody*, FOX NEWS, (Oct. 4, 2009), <http://www.foxnews.com/us/2009/10/04/baby-snatch-victim-loses-kids-state-custody>.

<sup>4</sup> Chris Echegaray & Kate Howard, *Reunited: Baby Is Home; Parents Are in the Clear*, TENNESSEAN, Oct. 7, 2009, at 1A. The public perception of Hispanic—and particularly undocumented Hispanic—immigrants as bad parents is an issue discussed in Part V below. See *infra* notes 329-349.

<sup>5</sup> Echegaray & Howard, *supra* note 4. State officials, however, were so inclined to believe the allegations that they were willing to order state placement over placement with relatives, adding to the trauma experienced by these children. See Travis Loller, *Relatives Question Why Officials Took Tenn. Baby*, SEATTLE TIMES (Oct. 8, 2009), [http://seattletimes.nwsource.com/html/nationworld/2010025222\\_apustennbabysnatched.html](http://seattletimes.nwsource.com/html/nationworld/2010025222_apustennbabysnatched.html). Maria's three-year old daughter, who had witnessed her mother's stabbing, found this separation especially traumatic; her trauma resulted in an illness that required hospitalization. *Id.* In addition, even after reunification, the investigation of the child trafficking allegations continued as police interviewed other family members. See Echegaray & Howard, *supra* note 4.

<sup>6</sup> See Loller, *supra* note 5. Gurrolla's case is not unique. According to Cathy Nahirny, a senior analyst with the National Center for Missing & Exploited Children, "there have been at least two other recent cases where an abductor used a ploy similar to the one used in this case." Hall & Hunter, *supra* note 2; see also E-Mail from Monzer Mansour, Attorney at Law, to author (Aug. 5, 2009, 11:37 AM) (on file with author) ("I litigated a case almost two years ago where my client, here illegally, was defrauded and intimidated by a childless couple into consenting to a permanent guardianship of my client's infant with no contact permitted between the child and the natural mother. The invidious goal was to eventually adopt the baby. After a one day trial, the judge thankfully decided in favor of my client and ordered the return of her baby after about a year or more of separation."); Rich Phillips, *Florida Parents Reunited with Baby Taken for 6 Months*, CNN JUST. (Feb. 3, 2010), [http://articles.cnn.com/2010-02-03/justice/florida.baby.returned\\_1\\_parents-child-florida-couple?\\_s=PM:CRIME](http://articles.cnn.com/2010-02-03/justice/florida.baby.returned_1_parents-child-florida-couple?_s=PM:CRIME) (describing the abduction of an undocumented immigrant couple's child by a woman who "used threats and intimidation against the parents to have control and access to the child. She threatened to deport them and report them to DCF (the Florida Department of Children and Families) to try and control them . . ."). "We need to get the word out to our immigrant communities," Nahirny said . . . [I]mmigrant families have

these events that demonstrate the unique vulnerabilities of undocumented immigrant families like Gurrolla's. If the issue were sympathies, it would be hard to find a more sympathetic mother than Gurrolla; she nearly lost her life attempting to protect her son.<sup>7</sup> Nevertheless, when the state received information regarding the potential, although unlikely and unsupported, threat of harm to Gurrolla's child, her sacrifices for her son were irrelevant and the harm that such removal could cause Gurrolla was immaterial.<sup>8</sup> The state needed only a single accusation to question Gurrolla's parental fitness and order the removal of her children.<sup>9</sup>

Gurrolla's case raises two serious concerns. The first is the state's decision to focus on what it perceived to be her children's best interests rather than Gurrolla's parental rights. The second is that Gurrolla's undocumented status appears to have increased the likelihood of having her parental fitness called into question. The Gurrolla case is troubling and, even if it were an isolated incident, the concerns it raises would still be worthy of discussion. The Gurrolla case, however, is not unique.<sup>10</sup> More than two dozen similar incidents have occurred across the United States, revealing that certain modes of reasoning and argument can ef-

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been targets of child abductions because of the assumption they will not tell police." Hall & Hunter, *supra* note 2.

<sup>7</sup> See Echegaray & Howard, *supra* note 4.

<sup>8</sup> See Loller, *supra* note 5.

<sup>9</sup> See Echegaray & Howard, *supra* note 4; Loller, *supra* note 5.

<sup>10</sup> See Ginger Thompson, *After Losing Freedom, Some Immigrants Face Loss of Custody of Their Children*, N.Y. TIMES, Apr. 23, 2009, at A15 (addressing the story of Encarnación Bail Romero and her son Carlos, stating that "lawyers and advocates for immigrants say that cases like his are popping up across the country as crackdowns against illegal immigrants thrust local courts into transnational custody battles and leave thousands of children in limbo"); Telephone Interview with Chris Huck, lawyer for Bail Romero and Maria Luis, DLA Piper (Aug. 13, 2009) (stating that he knew of maybe 12 cases from Nebraska alone, but noting that such cases are "rarely appealed"); see also Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 115 (2011) (describing the results of 52 surveys and 20 interviews, which revealed that the majority of the lawyers, case workers, and judges in the immigrant family separation cases surveyed had encountered "cases in which one or more family members were in detention facilities . . . at least one to five times in the past five years, and many reported encounters with such cases significantly more than five times in the past five years"); Andrew Becker & Anna Gorman, *Nonviolent Crimes and Deportation*, L.A. TIMES, Apr. 15, 2009, at A20 ("The Human Rights Watch report estimates the deportations have caused the separation of more than 1 million family members."); Julie Gilbert Rosicky & Felicity Sackville Northcott, *Expanding the Meaning of Interjurisdictional: International Issues in Child Welfare*, INT'L SOC. SERVICE: U.S. BRANCH, INC., <http://www.iss-usa.org/uploads/file/Expanding%20the%20Meaning%20of%20Interjurisdictional.pdf> (noting that one of the ways children become separated from their families is when "[p]arent(s) are sent to their home country through immigration enforcement—the child is a US citizen and is taken in to social service custody").

fectively facilitate the removal of children from their undocumented immigrant parents and justify the termination of parental rights.<sup>11</sup>

Parents have a constitutional right to the care and control of their children and, under established case law, courts may not terminate the rights of fit parents.<sup>12</sup> The Tennessee Department of Children's Services returned Gurrolla's children but, in many similar cases, the parental rights of undocumented immigrants are ignored and replaced with a best interest of the child standard. This best interest standard is then used to justify terminating the undocumented parent's rights.<sup>13</sup> The movement to replace the parental rights standard with a best interest of the child standard has been growing over the 1990s and through the new millennium but, in the context of immigrant children best interest considerations, are poised to supplant all other considerations when determining the care and custody of immigrant children.<sup>14</sup>

This Article explores the issue of immigrant family separations and parental rights terminations and analyzes the legal, social, and bureaucratic frameworks in which these decisions occur. Part I of this Article shows that removing immigrant children from parental care conflicts with both established constitutional principles regarding family integrity and assumptions undergirding traditional immigration law. Part II demonstrates that, despite this conflict, removals are in strong accord with the changing focus of family law and policy. Specifically, the removal of children from undocumented parents is the result of the success and substantial influence of the Children's Rights Movement and its emphasis on best interest considerations. Part III discusses cases involving the

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<sup>11</sup> See Posting of Norman Pflanz, npflanz@neappleseed.org, to help-immigemplrights@yahoo.com (Jul. 30, 2009) (on file with author) (describing a study by Nebraska Appleseed that revealed: "1. The Nebraska Department of Health and Human Services removes children of non-citizens from their parents at higher rates than children of citizens. 2. Immigrant families are more likely not to be provided a case plan in their native language nor informed about local resources available to them. 3. Once in the system, these families face language, cultural, and oftentimes, geographic barriers to receiving services necessary for reunification. 4. Based on these factors, immigrant families are more likely to be broken apart than families in which all members are U.S. citizens").

<sup>12</sup> See Elizabeth Bartholet, *Taking Adoption Seriously: Radical Revolution or Modest Revisionism?*, 28 CAP. U. L. REV. 77, 85–86 (1999); *infra* notes 49–60 and accompanying text.

<sup>13</sup> See, e.g., *In re Angelica L.*, 767 N.W.2d 74, 94 (Neb. 2009); *Anita C. v. Superior Court*, No. B213283, 2009 WL 2859068, at \*9 (Cal. Ct. App. Sept. 8, 2009); *infra* notes 270–309 and accompanying text.

<sup>14</sup> See, e.g., Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 897 (2009) (discussing the rise of the children's rights movement and the increasing focus on best interest analyses); *infra* notes 54–65 and accompanying text. In fact, the reach and importance of the best interest analysis has been steadily increasing since the 1990s.

termination of parental rights of undocumented parents. These cases demonstrate the power and persuasiveness of best interest arguments and the receptiveness of courts and agencies to those arguments. Part IV discusses the lack of court and state agency consideration for immigrant parents' post-deportation circumstances in best interest analyses. Part V summarizes the arguments that states and agencies use to persuade courts that permanently removing children from the care of fit but undocumented parents is in the child's best interest. Finally, Part VI discusses the problems with relying on a best interest standard, looking to American history for comparisons and also examines whether these removals have gone too far and exceeded public support for elevating children's rights over parental rights. The broader normative question of whether such removals are justifiable on moral or policy grounds, and whether the law can and should be changed to permit them, are explored in a companion article.<sup>15</sup>

## I. OVERVIEW OF THE TERMINATION OF PARENTAL RIGHTS

For decades, the law has struggled with the tension between children's rights and parental rights. Although not inevitable, the recognition of one has often meant the diminishment of the other. U.S. case law has long favored parental rights over children's rights and, absent a clear showing of serious, perhaps detrimental harm, courts did not question parental decisions concerning children.<sup>16</sup> As long as a parental decision was not gravely injurious, the fact that it might not be in the child's best interest was irrelevant.<sup>17</sup> Cases covering a wide range of issues—from minors' marriages, abortions, discipline, and speech—all demonstrate the deference given to parental decisions concerning their children, even when such deference comes at the expense of a child's best interest.<sup>18</sup>

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<sup>15</sup> See generally Marcia Zug, *Should I Stay or Should I Go: Why Immigrant Reunification Decisions Should Be Based on the Best Interest of the Child*, 2011 BYU L. REV. 1139 (discussing the moral and policy justifications of removal and suggesting a shifting standard for when to use a parental rights or best interest analysis).

<sup>16</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *Wisconsin v. Yoder*, 406 U.S. 205, 229–30 (1972); *Willis v. State*, 888 N.E.2d 177, 180 (Ind. 2008).

<sup>17</sup> See *Troxel*, 530 U.S. at 65–66; *Santosky v. Kramer*, 455 U.S. 745, 753 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

<sup>18</sup> See, e.g., *Troxel*, 530 U.S. at 75 (noting that a state law that allowed any third party to petition for child visitation rights over parental objections violated the fundamental right of parents to raise their children); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899–900 (1992) (holding that the state may require that an unemancipated woman under the age of eighteen obtain informed parental consent, even if this requires an in-person

### A. The Parental Rights Doctrine

Every day, hundreds, perhaps thousands of parents lose custody of their children.<sup>19</sup> The standard for initial removal is often low.<sup>20</sup> Children are typically removed due to allegations of abuse and neglect and, in a handful of states, children can even be removed when courts simply determine that removal is in their “best interest.”<sup>21</sup> Unlike removal, however, the standard for termination is rigorous and is not solely based on a child’s best interest.<sup>22</sup> When considering termination of parental rights, a best interest analysis is an appropriate consideration only after a finding of unfitness.<sup>23</sup> Parents have a constitutional right to the care and custody of their children and only unfit parents lose this right.<sup>24</sup>

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visit by the parent to the facility and the imposition of a twenty-four-hour waiting period); *Yoder*, 406 U.S. at 234 (holding that the state cannot compel school attendance past eighth grade, as this requirement would violate the fundamental right to direct the religious upbringing of children); *Willis*, 888 N.E.2d at 184 (setting aside the conviction of a parent who used physical force to discipline her child on the basis of parental privilege).

<sup>19</sup> See *The AFCARS Report*, U.S. DEPARTMENT HEALTH & HUMAN SERVICES, ADMIN. FOR CHILD. & FAM. (Oct. 2009), [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report16.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report16.htm) (finding that 273,000 children entered foster care in 2008).

<sup>20</sup> See Theo Liebmann, *What’s Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL’Y 141, 145 (2006) (describing the standard as having a “remarkably narrow and short-sighted perspective”).

<sup>21</sup> See, e.g., COLO. REV. STAT. § 19-1-115 (2011) (allowing a court to remove a child from his or her home according to the child’s best interest); MASS. GEN. LAWS ch. 119, § 29C (2010) (allowing removal when continuation the in home is contrary to the child’s best interest); OR. REV. STAT. § 419B.150(2)(b) (2009) (allowing protective custody when it is in best interests of child). The majority of states require “that the risk of harm in the child’s home be analyzed, and if that risk meets a certain level—usually ‘imminent,’ ‘serious’ or some combination thereof—then a removal is deemed warranted.” See Liebmann, *supra* note 20, at 145–46; see, e.g., CONN. GEN. STAT. § 46b-129(B)(1) (2011) (allowing removal when the child is in immediate danger and it is necessary to ensure the child’s safety); HAW. REV. STAT. § 587A-8 (2011) (allowing removal when continued placement with the parents presents a risk of imminent harm); 705 ILL. COMP. STAT. 405/2-10 (1999) (allowing removal when there is an immediate and urgent necessity for the safety and protection of the child); IND. CODE § 31-34-2-3(a)(1) (2011) (allowing removal when a child’s physical or mental condition will be seriously impaired or endangered if not immediately taken into custody); MD. CODE ANN., FAM. LAW § 5-709(a)(2) (LexisNexis 2011) (allowing removal for a child in serious, immediate danger); MO. REV. STAT. § 210.125.2 (2011) (allowing removal for a child in imminent danger of serious physical harm or upon a threat to his or her life).

<sup>22</sup> See, e.g., *In re D.T.*, 818 N.E.2d 1214, 1227 (Ill. 2004); *In re Terrance G.*, 731 N.Y.S.2d 832, 847 (Fam. Ct. 2001).

<sup>23</sup> See, e.g., *In re D.T.*, 818 N.E.2d at 1227 (explaining that once a parent is found unfit, then all considerations must yield to the best interest of the child); *In re P.L.*, 778 N.W. 2d 33, 36 (Iowa 2010) (noting that in the 1970s “scholars began questioning the best interest standard used by the courts to terminate parental rights” and that this standard was ultimately rejected because a best interests test “provided little or no guidance for the court in deciding when to terminate a parent’s parental rights”); *In re Terrance G.*, 731 N.Y.S.2d at

In the 1972 case of *Stanley v. Illinois*, the Supreme Court struck down an Illinois state law automatically depriving unmarried fathers of custody of their biological children upon the death of the mother.<sup>25</sup> The statute in *Stanley* reflected the state's assumption that being raised by a single father is not in a child's best interest.<sup>26</sup> The Supreme Court found this consideration irrelevant.<sup>27</sup> The *Stanley* Court held that, unless a parent is shown to be unfit, the parent has the constitutional right to the care and upbringing of his or her children.<sup>28</sup> Therefore, the Court found it unconstitutional to require the father to prove that he had a right to raise his children.<sup>29</sup>

Ten years later, the Court decided *Santosky v. Kramer*.<sup>30</sup> The *Santosky* Court declared unconstitutional a New York statute permitting determinations of "permanent neglect" to be based on a "fair preponderance of the evidence."<sup>31</sup> The Court explained that the parental right to the care and custody of children is a fundamental liberty interest and concluded that, before a state may terminate parental rights, it must support its allegations by at least "clear and convincing evidence."<sup>32</sup>

Then, in June of 2000, the Supreme Court decided *Troxel v. Granville*, reaffirming the importance of parental rights and the inapplicabil-

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847 ("In many cases the State may, and under some legal systems undoubtedly does, find "better" parents for a child even though the natural parents may be willing and able to provide proper care.' But it is fundamental to our legal and social system, that it is in the best interest of a child to be raised by his parents, unless the parents *are* unfit . . .") (internal citation omitted) (quoting *In re Sanjivini K.*, 391 N.E.2d 1316, 1321 (N.Y. 1971)); *Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2119 (2003) (arguing that the state's role must be "restricted to the goal of ensuring parental fitness, not extended to protect the relative and potentially imprecise 'best interest' of the child"); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 637 (1976).

<sup>24</sup> See, e.g., *Santosky*, 455 U.S. at 753 (describing this right as "a fundamental liberty interest").

<sup>25</sup> *Stanley*, 405 U.S. at 658.

<sup>26</sup> See *id.* at 648.

<sup>27</sup> See *id.* at 654–55, 658.

<sup>28</sup> See *id.* at 658.

<sup>29</sup> See *id.*; see also *Santosky*, 455 U.S. at 767 (explaining that a child may only be removed and placed in another home "when it is *clear* that the natural parent cannot or will not provide a normal family home for the child") (quoting N.Y. SOC. SERV. LAW § 384-b.1(a) (iv) (McKinney 2011)).

<sup>30</sup> *Santosky*, 455 U.S. at 770.

<sup>31</sup> See *id.* at 748, 768.

<sup>32</sup> *Id.* at 769; see also *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 846–47 (1977) (refusing to grant constitutional protections to foster parents that would infringe on the constitutional right of parents to the care and custody of their children).



ity of a best interest standard.<sup>33</sup> The *Troxel* Court described the “interest of parents in the care, custody, and control of their children [a]s perhaps the oldest of the fundamental liberty interests recognized by [the] Court” and held that

so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.<sup>34</sup>

These Supreme Court cases illustrate what is often referred to as the parental rights doctrine.<sup>35</sup> This doctrine holds that children should remain with their birth parents “and that the state should play an extremely limited role in overseeing the conditions of their lives . . . .”<sup>36</sup> These cases reflect the strong constitutional protections afforded parental rights and the limited role the government is expected to play in supervising what occurs within the family.<sup>37</sup> Put simply, this means that parents must exercise a minimum degree of care and, unless they are found to be unfit for falling below this low standard of care, the state may not interfere with the custody and care of their children.<sup>38</sup> Conse-

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<sup>33</sup> See *Troxel*, 530 U.S. at 72–73.

<sup>34</sup> *Id.* at 65, 68–69; see also *id.* at 96 (Kennedy, J., dissenting) (“For that reason, ‘[s]hort of preventing harm to the child,’ the court considered the best interests of the child to be ‘insufficient to serve as a compelling state interest overruling a parent’s fundamental rights.’”) (quoting *In re Smith*, 969 P.2d 21, 30 (Wash. 1998)); MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 38–39 (2005) (“The parental rights doctrine protects parents from having to defend their right to their children’s custody on grounds that parental custody would further the children’s best interests. A best interests inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry. And it cannot be otherwise.”).

<sup>35</sup> See *Troxel*, 530 U.S. at 72–75; *Santosky*, 455 U.S. at 767; *Stanley*, 405 U.S. at 648; see also Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683, 688–89 (2001) (“‘Parental rights doctrine’ refers to the . . . doctrine that defines parents and limits intervention into the family.”).

<sup>36</sup> GUGGENHEIM, *supra* note 34, at 36.

<sup>37</sup> See *Troxel*, 530 U.S. at 72–75; *Santosky*, 455 U.S. at 767; *Stanley*, 405 U.S. at 648; see also GUGGENHEIM, *supra* note 34, at 36 (stating that, under this doctrine, the government’s role is limited to defining the “outer limits of what is acceptable parenting”). “Government bureaucracies (‘impersonal political institutions’ in the language of the Supreme Court) have been criticized for being inept at many functions.” GUGGENHEIM, *supra* note 34, at 38. Therefore, because government bureaucracies are likely inept in making best interest analyses, they should limit—rather than encourage—their own involvement in such decisions. See *id.* This doctrine thus prevents “state officials, who will never know children better than the adults who have directly nurtured them, from making childrearing decisions.” *Id.*

<sup>38</sup> See *Troxel*, 530 U.S. at 72–75; *Santosky*, 455 U.S. at 767; *Stanley*, 405 U.S. at 648; GUGGENHEIM, *supra* note 34, at 36.

quently, the current state of the law regarding parental rights can be described as a fitness standard.<sup>39</sup> It is not a best interest of the child standard.<sup>40</sup>

### B. Immigrant Parents' Rights

The constitutional rights of parents are not confined to citizens.<sup>41</sup> Immigrant parents also have the right to the care and custody of their children, and U.S. immigration law assumes that immigrant parents will retain custody of their children regardless of immigration status.<sup>42</sup> In fact, immigration decisions are often based on the assumption that children and parents will be reunited in the parents' country of origin after deportation.<sup>43</sup>

For example, the Board of Immigration Appeals (BIA) specifically held that, when an alien-parent's child "is below the age of discretion, . . . it is his parents' decision whether to take him along to leave him in this country when and if they are deported."<sup>44</sup> Many courts have repeatedly affirmed this conclusion.<sup>45</sup> In fact, immigration authorities are so skeptical of parents' claims that deportation will result in separation

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<sup>39</sup> See *Troxel*, 530 U.S. at 72–75; *Santosky*, 455 U.S. at 767; *Stanley*, 405 U.S. at 648; GUGGENHEIM, *supra* note 34, at 36–37.

<sup>40</sup> See *Troxel*, 530 U.S. at 72–75; *Santosky*, 455 U.S. at 767; *Stanley*, 405 U.S. at 648; GUGGENHEIM, *supra* note 34, at 36–37.

<sup>41</sup> See *Troxel*, 530 U.S. at 65; *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). The Supreme Court has held that constitutional protections of the "Fourteenth Amendment . . . [are] not confined to the protection of citizens . . . . [The] provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ." *Yick Wo*, 118 U.S. at 369; see also *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term."). That Congress's power over immigration is considered plenary means two things: "[f]irst, Congress's authority to regulate immigration derives not from any constitutionally enumerated power, but rather is 'inherent' in the United States' 'sovereignty' as an independent nation. Second, in its exercise of that authority, Congress—and, by delegation, the Executive—is buffered against judicially enforceable constitutional constraints." Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.-C.I.L. L. REV. 1, 3 (2010).

<sup>42</sup> See *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984); *Ayala-Flores v. INS*, 662 F.2d 444, 446 (6th Cir. 1981); *In re B & J*, 756 N.W.2d 234, 239–40 (Mich. Ct. App. 2008) (citing *Liu v. U.S. Dep't of Justice*, 13 F.3d 1175, 1177 (8th Cir. 1994)).

<sup>43</sup> See *Newton*, 736 F.2d at 343; *Ayala-Flores*, 662 F.2d at 446; *In re B & J*, 756 N.W.2d at 239–40.

<sup>44</sup> *Liu*, 13 F.3d at 1177; see also *Newton*, 736 F.2d at 343; *Ayala-Flores*, 662 F.2d at 446; *In re B & J*, 756 N.W.2d at 240 n.5 (citing *Liu*, 13 F.3d at 1177).

<sup>45</sup> See Marcia Zug, *Deporting Grandma: Why Grandparent Deportation May Be the Next Big Immigration Crisis and How to Solve It*, 43 U.C. DAVIS L. REV. 193, 218–19 (2009) (providing examples of many similar immigration decisions).

from their children that parents must present significant proof that they will not take the children with them upon deportation.<sup>46</sup> Even then, the BIA has held that “absent proof of extreme hardship to a child if he returns to his parents’ native country with them, [it] will generally consider the decision to leave the child in the United States to be a matter of personal choice.”<sup>47</sup> Consequently, regardless of status, immigrants have the same legal right to the care and custody of their children as all other American parents.<sup>48</sup>

## II. THE CONTROVERSIAL RISE OF THE CHILDREN’S RIGHTS MOVEMENT

Parents have a constitutional right to the care and custody of their children.<sup>49</sup> Moreover, the constitutional rights of parents are not confined to citizens, as immigrant parents also have the right to the care and custody of their children.<sup>50</sup> Since the mid-1990s, however, the traditional deference accorded to parental rights has weakened.<sup>51</sup> Increasingly, critics are calling for best interest considerations to trump paren-

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<sup>46</sup> See *id.* at 219. Parents claiming that deportation will result in separation, thereby creating extreme hardship, must present the government with proof of intention to separate; immigration courts repeatedly reject such claims based on a lack of proof. See *id.*; see also *In re Ige*, 20 I. & N. Dec. 880, 885 (B.I.A. 1994) (stating that “[t]he claim that the child will remain in the United States can easily be made for purposes of litigation, but most parents would not carry out such an alleged plan in reality”).

<sup>47</sup> *In re Ige*, 20 I. & N. Dec. at 886.

<sup>48</sup> See *id.*; Zug, *supra* note 45, at 218–19. Many challenges to deportation claim that the resultant family separation violates the constitutional rights of the U.S. citizen children. See Zug, *supra* note 45, at 219–20. Those challenges, however, normally fail because courts assume that separation is a choice. See *id.* When separation cannot be considered a choice, then the possibility of a successful constitutional challenge increases greatly. See, e.g., *id.*; *More Than 100 Kids Sue Over Parents’ Deportations*, USA TODAY (June 17, 2009), [http://www.usatoday.com/news/nation/2009-06-17-deportation\\_N.htm](http://www.usatoday.com/news/nation/2009-06-17-deportation_N.htm) (describing a constitutional challenge brought by 150 U.S. citizen children protesting their parents’ deportations).

<sup>49</sup> See Bartholet, *supra* note 12, at 85–86; Zug, *supra* note 45, at 218–20.

<sup>50</sup> See *Newton v. INS*, 736 F.2d 336, 343 (6th Cir. 1984); *In re Ige*, 20 I. & N. Dec. 880, 886 (B.I.A. 1994); Zug, *supra* note 45, at 218–20.

<sup>51</sup> Compare Solangel Maldonado, *When Father (or Mother) Doesn’t Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 871 (2003) (arguing against the idea that parental rights are justified based on the parents’ greater likelihood of acting in their child’s best interest), with Emily Buss, Essay, “Parental” Rights, 88 VA. L. REV. 635, 647 (2002) (“Parents’ strong emotional attachment to their children and considerable knowledge of their particular needs make parents the child-specific experts most qualified to assess and pursue their children’s best interests in most circumstances. In contrast, the state’s knowledge of and commitment to any particular child is relatively thin.”). This weakness is shown by the prevalence of best interest arguments in courtrooms, child welfare administrations, and the legislature. See Maldonado, *supra*, at 871–72.

tal rights.<sup>52</sup> This change, combined with the vulnerable position occupied by minorities and undocumented immigrants, may explain the otherwise surprising receptivity with which a number of courts have received best interest arguments in undocumented immigrant parent termination cases.<sup>53</sup>

### A. *The Child Welfare System*

The importance of parental rights continues, but has begun to weaken, and this is particularly true in the context of the child welfare system.<sup>54</sup> Traditionally, the emphasis on parental rights meant that family preservation was the clear goal of the child welfare system.<sup>55</sup> Consequently, removing children to facilitate adoption was not considered a desirable option.<sup>56</sup>

Beginning in the 1990s, however, leading scholars—such as Elizabeth Bartholet, Richard Banks, and Richard Barth—began to voice their strong opposition to the traditional approach of the child welfare system.<sup>57</sup> They argued that a child welfare system that ultimately aims to protect the rights of parents is one that neglects the rights and perhaps endangers the lives of children.<sup>58</sup> Their work criticized the traditional

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<sup>52</sup> See *In re D.T.*, 818 N.E.2d 1214, 1220 (Ill. 2004); *In re B & J*, 756 N.W.2d 234, 240–41 (Mich. Ct. App. 2008); Bartholet, *supra* note 12, at 89–90.

<sup>53</sup> See *In re D.T.*, 818 N.E.2d at 1220; *In re B & J*, 756 N.W.2d at 240–41; see, e.g., Bartholet, *supra* note 12, at 89–90; Maldonado, *supra* note 51, at 871–72.

<sup>54</sup> See *In re D.T.*, 818 N.E.2d at 1220; *In re B & J*, 756 N.W.2d at 240–41; see, e.g., Bartholet, *supra* note 12, at 89–90; Maldonado, *supra* note 51, at 871–72.

<sup>55</sup> Bartholet, *supra* note 12, at 85–86 (“Family preservation has always been the dominant *modus operandi* in the child welfare system.”).

<sup>56</sup> See *id.* at 86. Adoption was considered a last resort for exceptional situations, and was not perceived “as a normal and appropriate way to arrange for the care of children whose birth parents cannot or will not provide care.” See *id.*

<sup>57</sup> See *id.* at 84–86; Raymond C. O’Brien, *An Analysis of Realistic Due Process Rights of Children Versus Parents*, 26 CONN. L. REV. 1209, 1211–13, 1234–35, 1251–52 (1994). See generally ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) (discussing the history of the child welfare system and how it does not take into account the best interest of the child); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998) (stating that race preferences in adoption are harmful because they limit the likelihood of adoption and arguing for a strict non-accommodation policy that would prevent adoption agencies from facilitating these racial preferences); Richard P. Barth, *Abusive and Neglecting Parents and the Care of Their Children*, in *ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY* 217 (Mary Ann Mason et al. eds., 1998) (arguing for less emphasis on family preservation and more on children’s developmental needs, permanency, and adoption to meet those needs).

<sup>58</sup> See Bartholet, *supra* note 12, at 84–86; O’Brien, *supra* note 57, at 1211–13, 1251–52.

emphasis on family preservation and parental rights.<sup>59</sup> Instead, they sought increased attention to the child's best interest, which they frequently argued was the permanency and stability that could only be achieved through adoption.<sup>60</sup>

This emerging Children's Rights Movement succeeded in placing best interest considerations in the mind of the public.<sup>61</sup> The final years of the twentieth century witnessed a dramatic reversal in attitudes regarding family preservation, adoption, and children's rights.<sup>62</sup> Adoption, traditionally reserved for only the most exceptional circumstances, was increasingly viewed as the ultimate goal.<sup>63</sup> This policy shift is exemplified in two significant Congressional acts—the Adoption and Safe Families Act (ASFA) and the Multiethnic Placement Act (MEPA)—a model law on adoption known as the Uniform Adoption Act (UAA), and a special immigration status for children called Special Immigration Juvenile (SIJ).<sup>64</sup> All of these changes dramatically aided efforts to focus the child welfare system's attention on the best interest of the child rather than family preservation.<sup>65</sup>

### B. *The ASFA, MEPA, UAA, SIJ Status and the Triumph of Children's Rights*

Congress enacted the ASFA in response to the Adoption Assistance and Child Welfare Act (AACWA) and it represented a drastic shift in policy.<sup>66</sup> Congress had previously passed the Adoption Assistance and

<sup>59</sup> See Bartholet, *supra* note 12, at 84–86; O'Brien, *supra* note 57, at 1211–13, 1251–52.

<sup>60</sup> See Bartholet, *supra* note 12, at 84–87. Consequently, Bartholet has argued that, because of this lack of willingness to consider adoption, “[f]amily preservation has been regularly promoted and defended on the basis of a claim that the only alternative for children is foster and institutional care.” *Id.* at 86.

<sup>61</sup> See Bartholet, *supra* note 12, at 84–85; Bartholet, *supra* note 14, at 897.

<sup>62</sup> See Bartholet, *supra* note 12, at 84–85; Bartholet, *supra* note 14, at 897. For example, new research in the 1990s called into doubt the benefit of Intensive Family Preservation Services (IFPS), programs that were popular in the 1970s and 1980s. See Bartholet, *supra* note 12, at 84. During the 1980s, many jurisdictions adopted the IFPS model of “family preservation.” See Bartholet, *supra* note 14, at 896. “The basic idea was to prevent children described as ‘at risk of placement’ from being removed from their parents and placed in foster care. Child abuse and neglect was conceived of as occurring because of a crisis in the family, which could be resolved by intensive but short-term supportive services.” *Id.*

<sup>63</sup> See Bartholet, *supra* note 12, at 84–85 (describing perceptions of adoption).

<sup>64</sup> 8 C.F.R. § 204.11 (2010); UNIF. ADOPTION ACT (amended 1994), 9 U.L.A. 11 (2011).

<sup>65</sup> See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C. (2006)); Howard Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, 4056 (repealed); 8 C.F.R. § 204.11; UNIF. ADOPTION ACT, 9 U.L.A. 11; *infra* notes 72–113 and accompanying text.

<sup>66</sup> See 111 Stat. at 2115; ROBERT MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 353 (6th ed. 2009).

Child Welfare Act in 1980.<sup>67</sup> The primary objective of the AACWA was to help find permanent homes for children.<sup>68</sup> The AACWA's method for achieving this goal, however, was firmly rooted in the traditional ideas of family preservation.<sup>69</sup> The AACWA sought to achieve permanency by addressing the problems that could lead to removal and by aiding in the return of children to their families after they had been removed.<sup>70</sup> By the 1990s, however, the benefits of family preservation were increasingly being questioned and the AACWA became subject to mounting criticism.<sup>71</sup>

The ASFA came as a response to these growing criticisms and one of its major reforms clarified the AACWA's "reasonable efforts" standard.<sup>72</sup> Under the AACWA, states were required to make reasonable efforts to prevent the removal of children from their homes and to reunify them with their families following removal.<sup>73</sup> Although the AACWA did not specify the meaning of reasonable efforts, the ASFA expressed a clear statement that reunification is not possible or desirable in all cases.<sup>74</sup> Another change was the ASFA's strong approval of adoption.<sup>75</sup> The ASFA promotes adoption by reducing the amount of

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<sup>67</sup> Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 944 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.). The Community Partnership Movement, another family preservation movement, also gained popularity during this period. Like IFPS, the goal of this movement was "to keep more children identified as at risk for maltreatment with their parents, and the idea again is that, with more supportive services for those parents, the children can be kept safe." Bartholet, *supra* note 14, at 897.

<sup>68</sup> 42 U.S.C. § 670; BARTHOLET, *supra* note 57, at 25.

<sup>69</sup> 42 U.S.C. § 670; BARTHOLET, *supra* note 57, at 25–26.

<sup>70</sup> MNOOKIN & WEISBERG, *supra* note 66, at 353. Congress facilitated this goal by providing states with federal matching funds for foster care and adoption services if states adopted certain standards. *Id.*; see 42 U.S.C. § 670. Specifically, the Act requires that

(1) [S]tates must formulate case plans ("permanency planning") that are designed to achieve placement in the least possible restrictive setting, (2) states must conduct periodic case reviews, and (3) states must make "reasonable efforts" to prevent removal of children from the home and to reunify the family following removal . . . . Through these provisions Congress attempted to shift resources from temporary out-of-home care and to focus on channeling resources either to a child's natural family or to other permanent care alternatives.

MNOOKIN & WEISBERG, *supra* note 66, at 353.

<sup>71</sup> See BARTHOLET, *supra* note 57, at 26; Bartholet, *supra* note 12, at 84–86.

<sup>72</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.); MNOOKIN & WEISBERG, *supra* note 66, at 353.

<sup>73</sup> See Adoption and Safe Families Act § 101(a)(15)(D), 42 U.S.C. § 671(a)(15)(D) (2006).

<sup>74</sup> *Id.* § 101(a)(15)(A); see Bartholet, *supra* note 12, at 85.

<sup>75</sup> See Adoption and Safe Families Act § 101(a)(15)(C), 42 U.S.C. § 671(a)(15)(C); Bartholet, *supra* note 12, at 85.

time a child spends in foster care while waiting to reunite with his or her parents.<sup>76</sup> Under the ASFA, permanency hearings are now required no later than twelve months after a child enters foster care. Furthermore, states must seek termination of parental rights when children are in foster care for fifteen out of twenty-two consecutive months.<sup>77</sup> Such changes demonstrated a shift away from parental rights and toward a greater emphasis on children's rights.<sup>78</sup> These changes highlighted the increasing importance of children's rights and emphasized the position that a parent's right to reunification should not come at the expense of a child's right to stability and permanence.<sup>79</sup>

A second piece of legislation Congress passed during this period is the MEPA.<sup>80</sup> Prior to the MEPA, many states had laws and policies discouraging interracial adoptions and instead promoting same-race adoptions.<sup>81</sup> State legislatures passed these laws after the National Association of Black Social Workers (NABSW) expressed strong opposition to the increasing incidence of white families adopting black children in the 1960s and '70s.<sup>82</sup> The NABSW described such adoptions as "a form of race and cultural genocide."<sup>83</sup> Transracial adoptions dramatically decreased as a result of this condemnation.<sup>84</sup>

After the NABSW's condemnation, many states enacted race-matching laws that required the consideration of a child's race in adoption placements and gave preference to families with the same racial or ethnic make-up.<sup>85</sup> States without specific race-matching statutes often

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<sup>76</sup> See Adoption and Safe Families Act § 101(a)(15)(C), 42 U.S.C. § 671(a)(15)(C).

<sup>77</sup> 42 U.S.C. § 675(5)(E).

<sup>78</sup> Bartholet, *supra* note 14, at 928 (describing the ASFA as a "good law because it shifts the balance in child welfare law and policy somewhat in the direction of valuing children's rights more, and parents' rights less").

<sup>79</sup> See Bartholet, *supra* note 14, at 928.

<sup>80</sup> Howard Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, 4056 (repealed).

<sup>81</sup> See Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1455 n.197 (2006) (noting that "Arizona, Nevada, and Missouri had race matching policies that required that a child be available for adoption for a certain period of time . . . before he or she could be adopted by a family of a different race").

<sup>82</sup> Maldonado, *supra* note 81, at 1454-55.

<sup>83</sup> *Id.* at 1455 (internal quotation marks omitted).

<sup>84</sup> *Id.* ("Although most African Americans disagreed with the NABSW's views, transracial adoptions decreased dramatically after its statement.") (internal citations omitted).

<sup>85</sup> See *id.* at 1455 (citing David S. Rosettenstein, *Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot,"* 68 ST. JOHN'S L. REV. 137, 140 n.9 (noting that such informal policies in favor of race matching became part of department practice manuals)).

adopted informal race-matching policies.<sup>86</sup> By the 1990s, however, children's rights advocates were increasingly concerned that, because the majority of adoptive parents were white while the majority of children awaiting adoption were not, many children in foster care were not being adopted as a result of their race.<sup>87</sup>

Congress passed MEPA in 1994 to reverse these race-matching policies.<sup>88</sup> Like the ASFA, MEPA expressed Congress's clear approval of adoption and its desire to increase the number of adoptions of foster children.<sup>89</sup> The goal of MEPA was to increase adoptions by ensuring that race would not be a controlling factor in adoption decisions.<sup>90</sup> Congress passed the law to make sure that children would not remain in foster care when there were families, regardless of race, willing to adopt them.<sup>91</sup> Initially, MEPA did not meet much success because it permitted race to continue as a factor in placement decisions.<sup>92</sup> State race-matching continued after MEPA's enactment and, as a result, Congress amended MEPA.<sup>93</sup>

The MEPA amendments prohibit federally funded agencies from "deny[ing] to any individual the opportunity to become an adoptive or a foster parent, on the basis of race, color, or national origin of the individual, or of the child, involved . . . ."<sup>94</sup> After its amendment, MEPA expressly prohibited race-matching or any other consideration of race in placement decisions.<sup>95</sup> Since the amendments' passage, federal enforcement has become vigorous.<sup>96</sup> The U.S. Department of Health and

<sup>86</sup> See Maldonado, *supra* note 81, at 1455.

<sup>87</sup> See *id.* at 1455–56.

<sup>88</sup> Howard Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, 4056 (repealed) (codified at 42 U.S.C.A § 5115a (West 1995)); See Bartholet, *supra* note 12, at 85 (stating that "[g]iven that the near-universal policy and practice throughout the nation had been for child welfare agencies to place children with same-race families if at all possible, this law was truly revolutionary in concept").

<sup>89</sup> 108 Stat. at 4056; see Maldonado, *supra*, note 81, at 1456. See generally Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. (2006)).

<sup>90</sup> See 108 Stat. at 4056; Maldonado, *supra*, note 81, at 1456.

<sup>91</sup> See 108 Stat. at 4056; Maldonado, *supra* note 81, at 1455 ("Some African American children remained in foster care indefinitely, even though there were white families willing to adopt them.").

<sup>92</sup> See Maldonado, *supra* note 81, at 1455–56.

<sup>93</sup> Small Business Job Protection Act of 1996 § 1808(c), Pub. L. No. 104-188, 110 Stat. 1755, 1904 (codified as amended at 42 U.S.C. § 1996(b)(1)(A)); see Maldonado, *supra* note 81, at 1456–57.

<sup>94</sup> 42 U.S.C. § 1996b(1)(A).

<sup>95</sup> 42 U.S.C. § 1996b(1)(A) (2006); see Maldonado, *supra* note 81, at 1456–57.

<sup>96</sup> See Bartholet, *supra* note 14, at 928.



Human Services (DHHS) has imposed significant financial penalties upon a number of states for MEPA violations and has forced many more to modify placement practices.<sup>97</sup> The DHHS has thus demonstrated its strong commitment to enforcing MEPA.<sup>98</sup> Its hope is that vigorous enforcement will finally achieve the goals of MEPA and increase the adoptions of foster children.<sup>99</sup>

At the same time Congress was enacting MEPA and the ASFA, the National Conference of Commissioners on Uniform State Laws proposed the UAA.<sup>100</sup> The UAA is a model act that pertains to custody determinations after failed or thwarted adoptions.<sup>101</sup> Under the UAA, after an adoption has failed, a court may conduct a hearing to consider whether to allow non-parents to obtain custody rather than return the child to his or her biological parents.<sup>102</sup> Consequently, when an adoption fails to occur—often because there is no finding of unfitness or because the parent does not consent—the biological parent is not automatically entitled to regain custody of his or her child.<sup>103</sup> Instead, the court considers the best interest of the child and makes a determination regarding with whom the child should be placed.<sup>104</sup> In these cases,

<sup>97</sup> Elizabeth Bartholet, Commentary, *Cultural Stereotypes Can and Do Die: It's Time to Move on with Transracial Adoption*, 34 J. AM. ACAD. PSYCHIATRY & L. 315, 317–18 (2006). In 2003, Ohio was issued a penalty letter imposing a \$1.8 million fine. *Id.* In 2005, South Carolina received a penalty of \$107,481. *Id.* at 317–19.

<sup>98</sup> See *Child Welfare Policy Manual*, U.S. DEPARTMENT HEALTH & HUM. SERVICES ADMIN. FOR CHILD. & FAM. (Jul. 14, 2010), [http://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=171](http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=171); *Information Memorandum Im-03-01*, U.S. DEPARTMENT HEALTH & HUM. SERVICES ADMIN. FOR CHILD. & FAM. (Mar. 25, 2003), [http://www.acf.hhs.gov/programs/cb/laws\\_policies/policy/im/2003/im0301.htm](http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2003/im0301.htm).

<sup>99</sup> See Maldonado, *supra* note 81, at 1458. In addition, the MEPA's enactment has also influenced private agencies, which are increasingly willing to place children trans-racially. See *id.* (noting that “the majority of public agencies currently place children trans-racially, and most private agencies, although not bound by MEPA, frequently place African American children with white families”).

<sup>100</sup> UNIF. ADOPTION ACT (amended 1994), 9 U.L.A. 11 (2011).

<sup>101</sup> See *id.*

<sup>102</sup> *Id.* Only Vermont has adopted the UAA. VT. STAT. ANN. tit. 15A, §§ 1-101–8-101 (2011). A number of states, however, have also enacted similar statutes. See, e.g., 750 ILL. COMP. STAT. 50/20 (1999) (requiring a court to “promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings” after an adoption petition has been denied or vacated).

<sup>103</sup> See UNIF. ADOPTION ACT § 2-408 cmt. at 62 (amended 1994), 9 U.L.A. 60 (2011) (stating that a court’s conclusion that a parent is not unfit or does not consent to the child’s adoption “is not tantamount to a determination that the child must be placed in that parent’s custody”).

<sup>104</sup> Appell, *supra* note 35, at 728 n.191 (explaining that the UAA provides for a “determination whether return to the mother would be detrimental to the child when the

courts redefine the term parent to include thwarted adoptive parents, and thus, analyze these cases as a custody dispute.<sup>105</sup> As a result, courts are able to avoid the parental rights doctrine and apply the best interest of the child standard.<sup>106</sup> Like the ASFA and the MEPA, the UAA evinces a strong preference for adoption and a disinclination for reunification and parental rights.<sup>107</sup> Under the UAA, once a child is removed, he or she is potentially adoptable, regardless of parental consent or fitness.<sup>108</sup>

The effect of such acts, particularly MEPA and the ASFA, cannot be understated.<sup>109</sup> Although the majority of children (approximately 57%) still exit foster care through reunification, the rates of reunification have declined dramatically.<sup>110</sup> Children who entered the foster care system in 1997, the year the ASFA was passed, “had a 13% slower rate to reunification than those who entered in 1990.”<sup>111</sup> In addition, during this period, the number of children adopted from foster care increased substantially.<sup>112</sup> Since the enactment of the ASFA, the majority of states have doubled the number of children adopted out of foster care and, in some states, that number has tripled.<sup>113</sup>

### C. Children’s Rights and Immigration Law

The increasing focus on children’s rights also had an influence on immigration law.<sup>114</sup> In 1990, Congress changed immigration law to create the SIJ nonimmigrant legal status category.<sup>115</sup> Congress created the SIJ status to ensure that undocumented children who were victims of

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mother revokes her adoption consent after a failed attempt to have the father’s rights terminated and an adoption decree entered”).

<sup>105</sup> Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 21–22 (1997) (noting that in these situations, courts transform a “potential adoption case between the biological parent and third parties into a custody case where the dispute is between the parents”).

<sup>106</sup> *See id.*

<sup>107</sup> *See* Appell, *supra* note 35, at 728–29.

<sup>108</sup> *See id.*

<sup>109</sup> *See* Bartholet, *supra* note 12, at 83–90. *But see* Bartholet, *supra* note 14, at 871 (arguing that the disproportionality movement, which seeks to reduce the disproportionate number of African-American children in foster care, may indicate the beginnings of a swing back in the direction of family preservation).

<sup>110</sup> MNOOKIN & WEISBERG, *supra* note 66, at 332.

<sup>111</sup> *Id.* at 333.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *See* 8 U.S.C. § 1101(a)(27)(J) (2006); 8 C.F.R. § 204.11 (2010); My Xuan T. Mai, Note, *Children Under the Radar: The Unique Plight of Immigrant Juveniles*, 12 BARRY L. REV. 241, 244 (2009).

<sup>115</sup> *See* 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

abuse and neglect would be permitted to remain and receive care in the United States.<sup>116</sup> Congress's goal was to protect the best interests of these vulnerable children.<sup>117</sup> Under the SIJ provision, once a child is removed from parental care, declared dependent on a juvenile court, and eligible for foster care, the child becomes eligible for legal status adjustment as a SIJ.<sup>118</sup> These children may then take steps to become lawful permanent residents.<sup>119</sup> State regulations encourage caseworkers to identify these children and assist them in petitioning for lawful permanent resident status, which may eventually lead to citizenship.<sup>120</sup>

The ASFA, MEPA, UAA, and SIJ status provisions were a clear response to the growing influence of the Children's Rights Movement in

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<sup>116</sup> See 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11; see also Mai, *supra* note 114, at 244. SIJ status functions as such:

SIJ status involves a finding by the Family Court in the jurisdiction where the child lives that the child is dependent upon the family court, usually made in guardianship or foster care proceedings, and then an application to U.S. Citizenship and Immigration Services . . . or made in open court where the child is in removal proceedings. If granted, SIJ status results in adjustment to Lawful Permanent Resident status.

Jennifer L. Coyler et al., *The Representational and Counseling Needs of the Immigrant Poor*, 78 FORDHAM L. REV. 461, 470 n.34 (2009).

<sup>117</sup> See Mai, *supra* note 114, at 244. Part of the impetus for creating this category was the concern that undocumented children were not being removed from abusive and neglectful homes out of fear that removal would lead to deportation. See *id.* ("Similar to the Violence Against Women Act . . . , which provides aid to victims of domestic abuse, the SIJ statute was Congress' answer to a moral crisis involving undocumented children suffering neglect, abuse, or abandonment at the hands of those closest to them—their family.") (internal citations omitted). One of the problems with the original act, however, was its lack of clarity on whether it applied to children who had entered the country illegally. See *Gao v. Jenifer*, 185 F.3d 548, 552 (6th Cir. 1999). The technical amendments to section 245 of the Immigration and Nationality Act rectified these problems. See Miscellaneous and Technical Immigration Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1744 (codified as amended at 8 U.S.C. § 1255); 8 C.F.R. § 204.11. Subsection 245(h) of the Act permits adjustment of status regardless of the minor's original mode of entry into the United States. 8 U.S.C. § 1255(h).

<sup>118</sup> See 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11.

<sup>119</sup> See Memorandum from Erwin McEwen, Director of the Department of Children and Family Services, to DCFS and POS Child Welfare Staff Rules and Procedures Bookholders (May 16, 2008), available at <http://www.f2f.ca.gov/res/pdf/PolicyGuideImmigration.pdf>.

<sup>120</sup> See, e.g., *id.* (describing the requirement of DCFS workers to determine a child's citizenship "status and explain[] the benefits and services that may be unavailable to a child who does not become a legal permanent resident of the United States"); see also Cecilia Saco, *An Overview of Immigration Issues and Child Welfare from a Social Worker's Perspective*, DEPARTMENT OF CHILD. & FAM. SERVICES (L.A. COUNTY) (Dec. 12, 2007), <http://www.f2f.ca.gov/res/pdf/BeyondTheBench.pdf> (describing the work of the Special Immigrant Status Unit, which files the SIJ status applications for undocumented children; and noting that since 2006, the Unit had filed over 2400 applications for green cards).

that they all place the needs and rights of children above those of parents.<sup>121</sup> In short, they reflect the Children's Rights Movement's belief that the child's best interest is of paramount importance.<sup>122</sup> In addition, the influence of the Children's Rights Movement continues to grow and is clearly reflected in undocumented immigrant parent termination cases.<sup>123</sup> The Children's Rights Movement paved the way for the use and acceptance of arguments favoring a child's best interest.<sup>124</sup> And such arguments are now being used to justify the removal of children from fit, undocumented immigrant parents.<sup>125</sup> The following undocumented immigrant cases reveal that courts and social workers are willing to ignore parental rights and consider the best interest of the child above all else.

### III. IMMIGRANT TERMINATION CASES

Immigrant termination cases lie at the intersection of changing law and policy. Although the law traditionally protected parental rights and sought to ensure family integrity, children's rights have gained increasing importance along with the belief that such rights include the right to be with good, and not simply fit, parents.<sup>126</sup> These changing beliefs are exemplified in undocumented immigrant parent termination cases, where such arguments are often accepted. In these termination cases, courts commonly acknowledge the traditional rule that a parent must be deemed unfit before termination is appropriate, but

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<sup>121</sup> See Mai, *supra* note 114, at 246; *supra* notes 66–113 and accompanying text.

<sup>122</sup> See Mai, *supra* note 114, at 246; *supra* notes 66–113 and accompanying text. These acts have garnered significant academic support. See, e.g., Signithia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 HARV. EDUC. REV. 54, 79–80 (1988) (discussing empirical research concluding that trans-racial adoption yields academic advantages for black children); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 954 (1994) (“[A] white parent's denial of Black inferiority may be more believable because it is less self-serving.”).

<sup>123</sup> See, e.g., *Anita C. v. Superior Court*, No. B213283, 2009 WL 2859068, at \*9 (Cal. Ct. App. Sept. 8, 2009); *In re B & J*, 756 N.W.2d at 240.

<sup>124</sup> See, e.g., *Anita C.*, 2009 WL 2859068, at \*9; *In re B & J*, 756 N.W.2d at 240.

<sup>125</sup> See, e.g., *In re M.M.*, 587 S.E.2d 825, 832–33 (Ga. Ct. App. 2003); *In re B & J*, 756 N.W.2d at 240.

<sup>126</sup> See *Troxel v. Granville*, 530 U.S. 57, 72–75 (2000); *Willis v. State*, 888 N.E.2d 177, 184 (Ind. 2008) (implicitly refuting the position that parents who use corporal punishment are unfit); Annette R. Appell, “Bad” Mothers and Spanish-Speaking Caregivers, 7 NEV. L.J. 759, 761 (2007); Teresa W. Julian et al., *Cultural Variations in Parenting: Perceptions of Caucasian, African-American, Hispanic, and Asian-American Parents*, 43 FAM. REL. 30, 32 (1994).

then terminate parental rights based on a finding that termination is in the child's best interest, irrespective of parental fitness.<sup>127</sup>

### A. *Fitness and Initial Removal*

In undocumented immigrant termination cases, courts and welfare agencies frequently conclude that a parent's undocumented status alone demonstrates unfitness.<sup>128</sup> These conclusions reveal a primary concern with best interest considerations, as opposed to parental rights, and an assumption that living with undocumented parents is not in a child's best interest.<sup>129</sup> In these cases, the presumption of unfitness is often apparent from the first removal decisions.<sup>130</sup> Many of these cases begin with questionable charges of abuse and neglect.<sup>131</sup> Accusations by third parties, often those who want the child for themselves, are routinely given significant consideration.<sup>132</sup> Most tellingly, perhaps, is that lower courts in a handful of cases considered a parent's lack of English proficiency a sufficient reason to remove a child.<sup>133</sup>

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<sup>127</sup> See, e.g., *In re B & J*, 756 N.W.2d 234, 239–40 (Mich. Ct. App. 2008) (reversing a Michigan family court's termination of parental rights for erroneously construing the children's best interests and holding them as a paramount concern).

<sup>128</sup> See *In re M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (commenting on a juvenile court's termination of parental rights based on immigrant status). In other cases, courts simply ignore the requirement that they make a fitness inquiry and move immediately to considerations of the child's best interest. See, e.g., *Anita C. v. Superior Court*, No. B213283, 2009 WL 2859068, at \*5 (Cal. Ct. App. Sept. 8, 2009) (finding unfitness irrelevant because "return of [the child] to [the] mother would be detrimental to him").

<sup>129</sup> See *Anita C.*, 2009 WL 2859068 at \*5; *In re M.M.*, 587 S.E.2d at 832.

<sup>130</sup> See, e.g., *In re M.M.*, 587 S.E.2d at 832.

<sup>131</sup> See, e.g., *In re M.M.*, 587 S.E.2d at 827.

<sup>132</sup> See Vivi Abrams, *Fuller Says DHR Workers Removed Baby*, BIRMINGHAM NEWS, Oct. 25, 2003, at 13A (reporting that undocumented immigrant Marta Alonzo's son was placed in state care by two "community volunteers" who literally took the child from his family); Shaila Dewan, *Two Families, Two Cultures and the Girl Between Them*, N.Y. TIMES, May 12, 2005, at A16 (noting that the child's teacher accused the immigrant mother of being unfit and then received custody of the child); Omar Riojas, DLA Piper, Counsel for Encarnación Bail Romero, Address at The Impact of Immigration Policy on Children (Nov. 5, 2009) (describing how an undocumented mother lost custody of her child after a local teacher's aide offered babysitting services and then refused to return the child) (remarks on file with author).

<sup>133</sup> See Tim Padgett & Dolly Mascareñas, *Can a Mother Lose Her Child Because She Doesn't Speak English?*, TIME (Aug. 27, 2009), available at <http://www.time.com/time/nation/article/0,8599,1918941,00.html>. English proficiency is not a requirement for custody. See *Zuniga v. Ponce*, No. 1 CA-CV 08-0615, 2009 WL 4251630, at \*4 (Ariz. Ct. App. Nov. 27, 2009) ("There is no requirement for a parent to speak English in order to have custody of his or her child."). Consequently, it should come as no surprise that the majority of these decisions have been overturned on appeal. See, e.g., *In re B & J*, 756 N.W.2d at 237; *In re Angelica L.*, 767 N.W.2d 74, 80 (Neb. 2009); *infra* notes 255–266 and accompanying text. However, the likelihood of appeal in undocumented immigrant termination cases is low.

For example, the Mississippi Department of Human Services investigated an undocumented immigrant mother, Cirila Baltazar Cruz, after she gave birth to her daughter.<sup>134</sup> The Department immediately removed the child, finding that Cruz's lack of English proficiency "placed her unborn child in danger and will place the baby in danger in the future."<sup>135</sup> In a similar instance in Tennessee, the teacher of an immigrant mother's child accused the mother of neglect and urged officials to remove the child.<sup>136</sup> On review, a Tennessee court agreed, basing its decision on the mother's lack of English proficiency.<sup>137</sup> The court then prohibited contact with the daughter until the mother demonstrated her "commitment to her daughter" by learning to speak English.<sup>138</sup> Finally, in South Carolina, state authorities removed a child from her undocumented parents because the police mistook their indigenous dialect for slurred Spanish and charged them with public intoxication.<sup>139</sup>

### B. *Judicial Unfitness Determinations at the Juvenile Court Level*

Undocumented immigrant parental rights termination decisions mirror the presumptions underlying the initial removals.<sup>140</sup> These decisions are often based on nothing more than a parent's immigration status and again reveal a primary concern for the best interest of the child rather than parental rights.<sup>141</sup> For example, in *In re Angelica L.*, the state of Nebraska removed an undocumented immigrant mother's children after receiving allegations of neglect.<sup>142</sup> The mother, a native of Guatemala named Maria Luis, entered the United States without proper

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<sup>134</sup> See Padgett & Mascareñas, *supra* note 133.

<sup>135</sup> *Id.*

<sup>136</sup> Dewan, *supra* note 132.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* In fact, the court made no accommodations for the mother's lack of English proficiency. The mother, Felipa, spoke only an indigenous dialect called Mixtecan, but no Mixtecan translators were provided during the initial custody hearing. *Id.* Consequently, the mother could not defend herself against the charges of neglect. See *id.* When later asked how learning English would make Filipa a better mother, the judge replied, "It's common sense." *Id.* Though this case did not involve an undocumented immigrant, it nonetheless demonstrates that the acceptability of these biases is growing.

<sup>139</sup> Interview with Patricia Ravenhorst, Exec. Dir., S.C. Immigrant Victim's Network (Oct. 22, 2009). The child's babysitter, a woman who openly acknowledged her desire to gain custody of Martin and Lucia's daughter, provided the initial information regarding the parents' intoxication to the police. *Id.* Immediately after the couple's child entered into state custody, the babysitter requested custody of the child. *Id.*

<sup>140</sup> See *In re V.S.*, 548 S.E.2d 490, 492–93 (Ga. Ct. App. 2001); *In re Angelica L.*, 767 N.W.2d at 80.

<sup>141</sup> See *In re V.S.*, 548 S.E.2d at 492–93; *In re Angelica L.*, 767 N.W.2d at 80.

<sup>142</sup> *In re Angelica L.*, 767 N.W.2d at 81–82.

documentation in 1997.<sup>143</sup> Her son Daniel was born in 1998 and her daughter Angelica was born in 2004.<sup>144</sup> Angelica was born prematurely and, when she was one month old, her mother took her to the hospital where she was diagnosed as “suffering from dehydration, malnutrition, a urinary tract infection, and a left pulmonary branch stenosis.”<sup>145</sup>

After Angelica’s illness, Luis recognized she needed guidance and sought the assistance of Healthy Starts, a federal and state funded social services program that provides parents with child care information and assistance.<sup>146</sup> After Luis became involved in the Healthy Starts program, they sent reports to Nebraska DHHS expressing concern for the well being of Daniel and Angelica.<sup>147</sup> The department investigated the reports and determined them unfounded.<sup>148</sup> When Angelica next became ill, an employee from Healthy Starts once again contacted DHHS alleging abuse.<sup>149</sup> DHHS again determined the claim to be unfounded, but the report nevertheless triggered an investigation and, as a result of this investigation, DHHS determined Luis to be unfit.<sup>150</sup>

The juvenile court held that the state had proved her unfitness based on the fact that she “either A) embarked on an unauthorized trip to the United States with a newborn premature infant or B) gave birth to a premature infant in the United States” after entering the country illegally.<sup>151</sup> Without deciding between the two, the trial court held that either scenario demonstrated “that [Luis] did not provide the basic level of prenatal and postnatal care.”<sup>152</sup> According to the trial court,

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<sup>143</sup> *Id.* at 80.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 80–81. At the hospital, the doctor became aware of Maria’s immigration status and threatened to recommend deportation if Maria did not follow her instructions or follow up on Angelica’s medical care. *Id.* at 81.

<sup>146</sup> *Id.* at 81.

<sup>147</sup> *In re Angelica L.*, 767 N.W.2d at 81.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 81–82 (noting that these “allegations [of abuse] were never substantiated and were deemed to be unfounded”). Although the allegations were unfounded, the Nebraska DHHS removed the children after police arrested Maria for obstructing a government investigation. *Id.* at 82. They charged Maria with misidentifying herself as the children’s babysitter—rather than their mother—when the child welfare workers came to investigate the allegations of abuse. *Id.* at 81–82. After her obstruction arrest, Immigration and Customs Enforcement (ICE) officials took Maria into custody and scheduled her for deportation. *Id.* at 82.

<sup>151</sup> *Id.* at 87–88 (internal quotation marks omitted).

<sup>152</sup> *In re Angelica L.*, 767 N.W.2d at 88 (internal quotation marks omitted).

good mothers do not illegally cross the border if they are pregnant or have just given birth.<sup>153</sup>

Other courts use similar immigration violations to justify findings of unfitness.<sup>154</sup> In *In re V.S.*, the Georgia Department of Family and Children Services (DFCS) removed the daughter of an undocumented father shortly after birth when both she and her mother tested positive for cocaine.<sup>155</sup> The mother was addicted to drugs but the undocumented father never used drugs and had attempted to prevent the mother's drug use during pregnancy.<sup>156</sup> After the Georgia DFCS took custody of V.S., the father tried to visit but DFCS employees claimed that he needed an appointment and turned him away.<sup>157</sup> He had called repeatedly to set up appointments and, though DFCS had his name and contact information, the Department did not contact him or return his calls.<sup>158</sup> Only months later did DFCS permit him to see his daughter for one hour every fifteen days.<sup>159</sup> He kept each of his appointments, showed affection, and "seemed to genuinely love V.S."<sup>160</sup> Nevertheless, the juvenile court deemed him unfit, in part because he "is an illegal alien and is subject to deportation."<sup>161</sup>

Other cases are comparable.<sup>162</sup> In *In re M.M.*, a Georgia juvenile court found a father unfit and terminated his parental rights essentially due to his status as an undocumented immigrant and its concern about the "possibility that the father could someday be deported."<sup>163</sup> In addition, the juvenile court terminated the mother's rights based in part on her relationship with a man "who was an illegal alien."<sup>164</sup> Finally, in *In re*

<sup>153</sup> See *id.* at 87–88.

<sup>154</sup> See *In re V.S.*, 548 S.E.2d at 492–93.

<sup>155</sup> *Id.* at 492. He asked to pay child support but was told he would not be allowed to do so until a court hearing. *Id.* Georgia DFCS never created a reunification plan for the father. *Id.* When V.S. was 7 months old, the state petitioned to terminate both the mother and father's parental rights. *Id.* at 493.

<sup>156</sup> *Id.* at 492. The relationship began as one for money but turned into a romantic relationship. *Id.* The father and mother moved in together and the mother became pregnant. *Id.* The father gave her money for prenatal care and asked her to marry him. *Id.* She refused. *Id.* The father eventually moved out. *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *In re V.S.*, 548 S.E.2d at 492.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 493.

<sup>162</sup> See *In re M.M.*, 587 S.E.2d at 829, 831–32; *In re B & J*, 756 N.W.2d at 238.

<sup>163</sup> *In re M.M.*, 587 S.E.2d at 832. In this case, the father was an undocumented immigrant but not in deportation proceedings. See *id.* at 831. Nevertheless, the court clearly had a "problem with [the father's] INS situation." *Id.*

<sup>164</sup> *Id.* at 829.



*B & J*, a Michigan family court found two parents unfit, stating that they had been deported and thus “were unable to provide proper care and custody for the children.”<sup>165</sup>

Under the law, a parent’s undocumented status, by itself, is not enough to support an unfitness determination.<sup>166</sup> The above cases, however, demonstrate that such terminations occur nonetheless.<sup>167</sup> These decisions indicate that in undocumented immigrant parental rights terminations cases, trial courts are discarding the parental rights standard and employing a best interest of the child standard instead.

#### IV. IMMIGRANT PARENTS’ POST-DEPORTATION CIRCUMSTANCES

Given the state of the law, which maintains that parents must be found unfit before termination is appropriate, a finding of unfitness based on immigration status alone is inappropriate.<sup>168</sup> Nevertheless, some courts based their fitness determinations of immigrant status on what they believe is the best interest of the child.<sup>169</sup> The choice to elevate best interest considerations over parental rights explains the lack of sympathy courts and agencies demonstrate for the parents’ post-deportation circumstances. It also helps explain why courts and agencies believe that even outright interference with these parents’ attempts at achieving reunification is justified.

##### A. No Consideration of Deportee’s Post-Deportation Circumstances

Courts are tremendously unwilling to consider difficulties that an undocumented or deported parent might experience when trying to comply with the requirements of a reunification plan.<sup>170</sup> For example, *Anita C. v. Superior Court*—where a mother unsuccessfully attempted to take parenting classes after being deported to Guatemala—demonstrates one court’s lack of sympathy for the difficulties that undocumented immigrant parents encounter when trying to comply with re-

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<sup>165</sup> *In re B & J*, 756 N.W.2d at 238.

<sup>166</sup> *See In re V.S.*, 548 S.E.2d at 493–94.

<sup>167</sup> *See In re M.M.*, 587 S.E.2d at 829, 831–32; *In re B & J*, 756 N.W.2d at 238. Although some of these terminations are reversed on appeal, most such cases never get appealed. *See, e.g., In re B & J*, 756 N.W.2d at 237; *In re Angelica L.*, 767 N.W.2d at 80; *infra* notes 251–266 and accompanying text.

<sup>168</sup> *See In re V.S.*, 548 S.E.2d 490, 493–94 (Ga. Ct. App. 2001).

<sup>169</sup> *See Anita C. v. Superior Court*, No. B213283, 2009 WL 2859068, at \*8–9 (Cal. Ct. App. Sept. 8, 2009).

<sup>170</sup> *See id.*

unification plans in a foreign country.<sup>171</sup> This lack of sympathy shows that the primary concern of the court is achieving what it perceives as the child's best interest.<sup>172</sup>

Similarly, in *In re Angelica L.*, a Nebraska juvenile court held that the mother's "fear of deportation serves as no excuse for her failure to provide the minimum level of health care to her children."<sup>173</sup> It similarly found that her undocumented status did not excuse her failure to remedy the conditions that led to the initial finding of unfitness.<sup>174</sup> According to the court, "[b]eing in the status of an undocumented immigrant is, no doubt, fraught with peril and this [inability to satisfy the reunification plan] would appear to be an example of that fact."<sup>175</sup>

In *Anita C. v. Superior Court*, the court held that the lack of resources available to the deported mother in her home country did not excuse her inability to comply with her reunification plan, which required her to take specific parenting classes.<sup>176</sup> The California Court of Appeal dismissed the mother's explanation that the required classes were not taught in Guatemala.<sup>177</sup> It affirmed the juvenile court's recognition that the mother's ability to comply with the reunification plan was limited by the resources available to her but blamed her for this situation, stating that "we may also consider that mother [through deportation] placed herself out of reach of many of the services . . . [the state] could have provided."<sup>178</sup> Consequently, the Court of Appeal held that "due to [these] circumstances, mother could not adequately address the issues that led to her losing custody of the children," and

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<sup>171</sup> See *id.*

<sup>172</sup> See *id.* at \*9.

<sup>173</sup> *In re Angelica L.*, 767 N.W.2d. 74, 88 (Neb. 2009) (internal quotation marks omitted).

<sup>174</sup> See *id.*

<sup>175</sup> *Id.* (internal quotation marks omitted).

<sup>176</sup> See *Anita C.*, 2009 WL 2859068, at \*2, \*8. In *Anita C.*, child welfare officials removed the child, J.A., from his home after Anita left him unattended while at work. *Id.* at \*1. The state later charged her with, and she pled guilty to, child endangerment. *Id.* ICE officials then deported her. *Id.* The case initially concerned three older half siblings, but the court terminated jurisdiction over their cases when they returned to their father's custody. *Id.* at \*2 n.5.

<sup>177</sup> *Id.* at \*8.

<sup>178</sup> *Id.* at \*7. The court also blamed the mother for the failure of the international home study to be completed. *Id.* During the time the home study was to have been conducted the mother attempted to illegally re-enter the United States, presumably in a desperate attempt to reunify with her child. See *id.* at \*4.

agreed with the juvenile court, that this is simply “a sad consequence of illegal immigration.”<sup>179</sup>

### B. *Deportation as Abandonment*

In other cases, the courts’ lack of sympathy for the difficulties faced by undocumented immigrant parents manifests as a willingness to treat their deportation as abandonment.<sup>180</sup> *Perez-Velasquez v. Culpeper County Department of Social Services* involved an undocumented immigrant mother and father with three young, U.S. citizen children.<sup>181</sup> The state took custody of the children after a social worker visited the home and found the mother had left them unsupervised when she went for a job interview.<sup>182</sup> The father was incarcerated at the time his children were taken into custody and he was deported immediately after his release from prison.<sup>183</sup> Shortly thereafter, a Virginia court terminated both parents’ parental rights and the children became eligible for adoption.<sup>184</sup>

With regard to the father, the court found him unfit because he had, “without good cause, failed to maintain continuing contact with and to provide or substantially plan for the future of the [children] for a period of six months after the child’s placement in foster care . . . .”<sup>185</sup> The father challenged the decision, arguing that his failure to maintain contact with his children was because of his incarceration and deportation, and consequently, was not willful.<sup>186</sup> The court found this explanation irrelevant, however, stating that it was the “father’s own actions

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<sup>179</sup> *Id.* at \*5, \*8; see also E-mail from Hilda Lopez, Attorney, to author (Apr. 5, 2010) (on file with author) (describing an unpublished case from Massachusetts in which a juvenile court held that, because the deported mother could not come to the United States to regain custody, the state Department of Children and Family Services had no responsibility to make reasonable efforts at reunification).

<sup>180</sup> See *Perez-Velasquez v. Culpeper Cnty. Dep’t of Soc. Servs.*, No. 0360-09-4, 2009 WL 1851017, at \*2 (Va. Ct. App. June 30, 2009).

<sup>181</sup> *Id.* at \*1. See also *In re M.A.P.A.*, No. 98-1218, 1999 WL 711447, at \*2 (Iowa Ct. App. July 23, 1999) (finding termination of an undocumented immigrant father’s parental rights justified based on the fact that he was in prison and, once released, would be likely be deported and not “have sufficient time to develop a relationship with” his son).

<sup>182</sup> *Perez-Velasquez*, 2009 WL 1851017, at \*1.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at \*1, \*3.

<sup>185</sup> *Id.* at \*2 n.1, \*3. The father admitted he had no contact with his children during this period but argued that child welfare services never told him where the children were and that such contact would have been difficult because the children spoke English and he spoke primarily Mam and Spanish. *Id.* at \*2.

<sup>186</sup> *Id.*

[that] led to this situation.”<sup>187</sup> In addition, the court was horrified by the father’s reunification plan, which was to return to the United States illegally and take the children back with him.<sup>188</sup>

Similarly, in the case of Encarnación Bail Romero, a Missouri circuit court found that Bail Romero, an undocumented immigrant mother incarcerated after providing false identification papers during an Immigration and Customs Enforcement (ICE) workplace raid, had abandoned her son.<sup>189</sup> Although Bail Romero’s separation from her son was involuntary, the trial court still held that her actions constituted abandonment.<sup>190</sup> Finally, in *In re V.S.*, a Georgia juvenile court used the difficulties the undocumented father encountered when trying to visit his daughter as grounds for abandonment.<sup>191</sup> The court held that the father “has failed for more than one year to develop and maintain a parental bond with the child; he has not provided any financial support to the child [and] he only began visiting the child when she was nine months old.”<sup>192</sup> These statements, however, directly contradict the facts

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<sup>187</sup> See *Perez-Velasquez*, 2009 WL 1851017, at \*2. Although the court noted that incarceration by itself does not justify termination of parental rights, the court held that termination is permissible when incarceration is “combined with other evidence concerning the parent/child relationship.” *Id.* Other evidence included the father’s immigration status. See *id.* As noted by the trial court and upheld on appeal, the father’s deportation

eliminated any chance that he could maintain contact with the children and be involved in the foster care plan during the time period after the children’s placement in foster care, or that he could participate in remedying, within a reasonable time, the conditions resulting in the placement and continuation of the children in foster care.

*Id.*

<sup>188</sup> See *id.* As a convicted felon, any return to the United States would have been illegal; thus, the court found “[t]his plan was not viable, and it was not in the best interests of the children.” See *id.*

<sup>189</sup> *In re C.M.B.R.*, 332 S.W.3d 793, 801–02, 804 (Mo. 2011) (en banc). Although officials released other parents, Bail Romero was ineligible for release because she had used false identification. Thompson, *supra* note 10. “Such charges were part of a crackdown by the Bush administration, which punished illegal immigrants by forcing them to serve out sentences before being deported.” *Id.* After Bail Romero’s conviction, the Supreme Court in *Flores-Figueroa v. United States*, struck down a conviction under a law criminalizing aggravated identity theft. See 129 S. Ct. 1886, 1894 (2009). According to the Supreme Court, there must be intent and, consequently, this means that Bail Romero’s separation from her child was unnecessary and unjustified. See *id.*; *In re C.M.B.R.*, 332 S.W.3d at 804.

<sup>190</sup> *In re C.M.B.R.*, 332 S.W.3d at 816–18.

<sup>191</sup> See *In re V.S.*, 548 S.E.2d at 493.

<sup>192</sup> *Id.* The juvenile court also provided additional reasons such as

he failed to contact DFCS and went to Mexico without notifying anyone connected with this proceeding; he failed to respond to a certified letter from DFCS; he got the child’s mother pregnant knowing she had a drug problem;

of the case, which demonstrate that he had bonded with his child, attempted to pay child support, and actively sought visitation since her birth.<sup>193</sup>

### C. *Immigration Law*

A court's ability to ignore an immigrant parent's post-deportation circumstances or view deportation as abandonment is reinforced by the harsh immigration laws on illegal reentry.<sup>194</sup> In 1996, Congress sought to reduce the incidence of illegal immigration and passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>195</sup> One of the consequences of IIRIRA was increased penalties for illegal reentry after deportation.<sup>196</sup> In the context of immigrant parent terminations, this means that once a parent is deported, he or she is barred from returning to contest termination.<sup>197</sup> An undocumented parent who attempts illegal reentry risks arrest and his or her reasons for reentry receive no consideration.<sup>198</sup> As a result, deported parents can rarely

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he did nothing to stop the mother from abusing drugs; he has failed to obtain permanent employment with benefits; he has failed to obtain basic child care items, such as a car seat; and he does not have his own place to live.

*Id.*

<sup>193</sup> See *id.* at 492–93 (“In this case, the evidence shows that the father made numerous attempts to contact DFCS in order to visit his daughter, asked if he could pay child support, gave the child’s mother money for prenatal care, arranged for and kept his visitation appointments for the five-month period preceding the hearing, showed love and affection toward V.S. during visitation, and made arrangements for caring for the child should he be given custody.”).

<sup>194</sup> See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 334, Pub. L. No. 104-208, 110 Stat. 3009-548, 3009-635 (1996).

<sup>195</sup> 110 Stat. at 3009-635; see *Perez-Velasquez*, 2009 WL 1851017, at \*3; Statement on Signing the Omnibus Consolidated Appropriations Act, 1997, 2 PUB. PAPERS 1729, 1731 (Sept. 30, 1996) (“[The bill] also includes landmark immigration reform legislation that builds on our progress of the last 3 years. It strengthens the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system—without punishing those living in the United States legally.”).

<sup>196</sup> See 8 U.S.C. § 1326(a) (2006); 110 Stat. at 3009-635.

<sup>197</sup> See *United States v. Hernandez-Baide*, 392 F.3d 1153, 1158 (10th Cir. 2004), *rev’d on other grounds*, 544 U.S. 1015 (2005).

<sup>198</sup> 8 U.S.C. § 1326(a), (b) (2) (making reentry by a deported felon illegal); see *Hernandez-Baide*, 392 F.3d at 1158. Obviously not all deported parents have felony convictions, but after the new, stricter immigration controls, more undocumented immigrants are facing criminal charges and incarceration before deportation. See, e.g., *United States v. Saucedo-Patino*, 358 F.3d 790, 791 (11th Cir. 2004); *United States v. Dyck*, 334 F.3d 736, 737 (8th Cir. 2003); *United States v. Carrasco*, 313 F.3d 750, 753 (2d Cir. 2002).

return, thereby increasing the ability of courts to treat deportation as abandonment.<sup>199</sup>

The case of *United States v. Hernandez-Baide* is illustrative.<sup>200</sup> Officials arrested Arlette Hernandez-Baide, a deported immigrant mother, for criminal reentry when she returned to the United States to contest the termination of her parental rights and the subsequent adoption of her daughter.<sup>201</sup> A district court judge sentenced her “to twenty-four months imprisonment followed by three years [of] supervised release.”<sup>202</sup> She challenged the sentence, arguing that the court should have applied a downward departure—a sentence below the statutory minimum—based on mitigating circumstances concerning a lesser harm.<sup>203</sup> Specifically, on appeal to the Tenth Circuit, she argued that the district court should have considered the fact that she returned to the United States only to prevent termination of her parental rights and the adoption of her daughter.<sup>204</sup> The district court, however, denied her request for a downward departure and the Tenth Circuit affirmed.<sup>205</sup> The appeals court explained that Congress intended to make reentry a strict liability crime, and thus, a deported alien who makes an unauthorized reentry is “‘strictly liable’ for such criminal conduct, regardless of the underlying motivation for such illegal entry.”<sup>206</sup>

This conclusion has been consistently upheld.<sup>207</sup> A parent attempting illegal reentry to contest termination of parental rights is entitled to

<sup>199</sup> See, e.g., *Saucedo-Patino*, 358 F.3d at 794–95; *Dyck*, 334 F.3d at 741–42; *Carrasco*, 313 F.3d at 755–56; *Anita C.*, 2009 WL 2859068, at \*8 (deported mother attempted illegal reentry to contest termination of her parental rights and adoption of her child).

<sup>200</sup> 392 F.3d at 1155, 1158; see also *Saucedo-Patino*, 358 F.3d at 794–95; *Dyck*, 334 F.3d at 741–42; *Carrasco*, 313 F.3d at 755–56; *Anita C.*, 2009 WL 2859068, at \*4, \*8.

<sup>201</sup> *Hernandez-Baide*, 392 F.3d at 1154–55.

<sup>202</sup> *Id.* at 1155.

<sup>203</sup> *Id.*; see *infra* note 207 and accompanying text (discussing the impact of *United States v. Booker*).

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 1156. On appeal, the government argued that a lesser harm departure was not appropriate because “no connection exists between the crime of illegal reentry and the perceived harm, which in this case involved severance of her parental rights.” *Id.* Although the court did not use this as the basis for its decision, this argument reveals the government’s belief that deportation does not affect a parent’s ability to reunite with his or her child.

<sup>206</sup> *Id.* at 1158 (explaining that the statute “‘is designed to deter deported aliens from illegally reentering for any reason,’ thereby making ‘a deported alien’s unauthorized presence in the United States a crime in itself’”) (quoting *Carrasco*, 313 F.3d at 755).

<sup>207</sup> See, e.g., *Saucedo-Patino*, 358 F.3d at 794–95; *Dyck*, 334 F.3d at 741–42; *Carrasco*, 313 F.3d at 755–56. The Tenth Circuit decided *Hernandez-Baide* before the Supreme Court’s decision in *United States v. Booker*, where the Court held that sentencing guidelines must be construed as advisory rather than mandatory. *United States v. Booker*, 543 U.S. 220, 245

no leniency.<sup>208</sup> The penalties for illegal reentry are significant and the immigrant's motivations are irrelevant.<sup>209</sup> Consequently, once parents are deported, it is very unlikely they will be able to return to contest the termination of their parental rights.<sup>210</sup>

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(2005). As a result, the Court remanded the case but the Tenth Circuit subsequently reinstated its conviction. *United States v. Hernandez-Baide*, 146 F. App'x 302, 304 (10th Cir. 2005); *see also* *United States v. Mendez-Magana*, 102 F. App'x 590, 591 (9th Cir. 2004) (demonstrating that, even post-*Booker*, downward departures for family circumstances are still not permissible).

<sup>208</sup> *See Hernandez-Baide*, 392 F.3d at 1154–55.

<sup>209</sup> *See, e.g., United States v. Portillo-Alvarez*, 223 F. App'x 821, 823 n.2 (10th Cir. 2007) (holding that “this court has specifically held that § 5K2.11 departures are not allowed in illegal reentry cases because the crime of illegal reentry is not a specific intent crime”); *United States v. Prado-Jimenez*, 223 F. App'x 818, 820 n.4 (10th Cir. 2007) (stating in dicta that “based on the analysis of departures in *Hernandez-Baide* . . . it would be likewise improper for a district court to vary from the advisory guidelines range based solely on the defendant's motivation for reentering the United States”); *United States v. Barajas-Garcia*, 229 F. App'x 737, 741 (10th Cir. 2007) (stating “the criminal conduct of illegal reentry under which Mr. Barajas-Garcia was convicted, requires no specific motive or intent,” and thus the father's purpose for reentry—to protect his infant son from his drug addicted mother—could not be considered); *United States v. Herrera-Gonzalez*, No. CR 07-1602 JB, 2008 WL 2371564, at \*9 (D.N.M. Feb. 6, 2008); *United States v. Marinero*, No. CR-03-80-B-W, 2005 WL 851334, at \*10 (D. Me. April 13, 2005) (holding illegal reentry is a crime without a mens rea element).

<sup>210</sup> *See Hernandez-Baide*, 392 F.3d at 1154–55. Although immigrants often seek visas, such visas are commonly denied. *See, e.g., Adegboji v. Middlesex Cnty.*, 347 F. App'x 877, 879–80, 882 (3d Cir. 2009) (holding that a district court did not abuse its discretion when finding that multiple denials for a visa to reenter the country to attend trial did not warrant continuance); *Ordoñez v. Tacuri*, No. 09-CV-1571 (FB), 2009 WL 2928903, at \*1 n.1 (E.D.N.Y. Sept. 10, 2009) (noting that immigration officials denied a temporary visa to a mother that wished to attend a hearing in which she sought the return of her abducted son). One solution to this dilemma would be to make reentry for such purposes easier to obtain. The concerns posed by these cases, however, make this result unlikely. *See Portillo-Alvarez*, 223 F. App'x at 823 n.2; *Prado-Jimenez*, 223 F. App'x at 820 n.4; *Barajas-Garcia*, 229 F. App'x at 741; *Herrera-Gonzalez*, 2008 WL 2371564, at \*9; *Marinero*, 2005 WL 851334, at \*10. After a person has entered the country illegally, and particularly when he or she has committed a crime after unauthorized entry, the assumption is that the person is untrustworthy and the risk that they will overstay their visas is too great. *See Portillo-Alvarez*, 223 F. App'x at 823 n.2; *Prado-Jimenez*, 223 F. App'x at 820 n.4; *Barajas-Garcia*, 229 F. App'x at 741; *Herrera-Gonzalez*, 2008 WL 2371564, at \*9; *Marinero*, 2005 WL 851334, at \*10. The likelihood of permanent separation is also increased by the fact that many children are placed in English-speaking homes and lose the ability to communicate with their parents. Appell, *supra* note 126, at 771. Moreover, “federal law does not specifically require that children be placed in foster homes where their native or their parents' native language is spoken,” which shows that maintenance of language skills and ability to speak with natural parents are viewed as unimportant. *See id.* (noting that “72% of children in immigrant families speak a language other than English at home, and in 26% of these homes, nobody fourteen or older has a strong command of the English language”).

### D. State Actions

In cases like *In re Angelica L.* and *Anita C.*, courts demonstrate the belief that the primary consideration in parental rights termination cases should be the best interest of the immigrant child. Courts, however, did not reach this conclusion alone. In many instances, the actions of state child welfare agencies were instrumental in achieving termination.<sup>211</sup> In numerous cases, state child welfare agencies did not simply remove children, they also created the grounds for termination.<sup>212</sup> It is not uncommon for state child welfare agencies to withhold assistance, tell lies, and even contact immigration authorities if they believe such actions will ensure the termination of an immigrant parent's rights.<sup>213</sup>

For example, agencies are often highly resistant to providing reunification assistance to undocumented parents.<sup>214</sup> Even when reunification is the stated goal and courts order reunification services, the effort expended by assigned caseworkers is frequently minimal or non-existent.<sup>215</sup> Again, *In re Angelica L.* is illustrative.<sup>216</sup> First, the Spanish speaking mother received a non-Spanish speaking case worker.<sup>217</sup> Then, the caseworker gave her no contact information for her children and neglected to provide her with a physical copy of her case plan.<sup>218</sup> Finally, when the mother requested help complying with her case plan, the caseworker told her she would "have to take initiative for that' herself."<sup>219</sup> Similarly, in *In re B & J*, the caseworker's assistance in finding services for the parents consisted of a single phone call and an internet search.<sup>220</sup> In addition, the caseworker made no effort to contact the parents after losing touch with them and refused to ask the child how to reach the parents because she "had not wanted to upset him."<sup>221</sup>

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<sup>211</sup> See, e.g., *In re B & J*, 756 N.W.2d 234, 240 (Mich. Ct. App. 2008); *Angelica L.*, 767 N.W.2d at 95.

<sup>212</sup> See, e.g., *In re B & J*, 756 N.W.2d at 237.

<sup>213</sup> See, e.g., *id.* at 240; *Angelica L.*, 767 N.W.2d at 95.

<sup>214</sup> See, e.g., *In re B & J*, 756 N.W.2d at 240; *Angelica L.*, 767 N.W.2d at 95.

<sup>215</sup> See *Angelica L.*, 767 N.W.2d at 83, 95.

<sup>216</sup> See *id.*

<sup>217</sup> *Id.* at 83.

<sup>218</sup> *Id.* at 83–84.

<sup>219</sup> *Id.* at 84.

<sup>220</sup> *In re B & J*, 756 N.W.2d at 238.

<sup>221</sup> *Id.*; see also *Fairfax Cnty. Dep't of Family Servs. v. Ibrahim*, No. 0821-00-4, 2000 WL 1847638, at \*1 (Va. Ct. App. Dec. 19, 2000) (noting that the state argued that "rendering little or no service to the father amounted to rendering reasonable services because it could not offer services during [the father's] incarceration . . . ." and, according to the agency, "it had no way to provide services in Ghana") Specifically,



In other cases, agency employees actually lied to achieve the termination of an undocumented immigrant's parental rights.<sup>222</sup> For example, the Commissioner of the Alabama Department of Human Resources lied in numerous public statements about the danger that continued custody by Marta Alonzo, an undocumented immigrant teenage mother, posed to her son, Javier.<sup>223</sup> According to the Commissioner, the child had scabies and removal "saved his life."<sup>224</sup> He openly stated that "[t]here's no question but that he was in imminent danger."<sup>225</sup> These statements were untrue.<sup>226</sup> In fact, the child's doctor publicly disputed this testimony, stating that Alonzo was a fit parent who sought medical treatment and never placed her child in danger.<sup>227</sup> Likewise, in *In re Angelica L.*, a foreign home-study was conducted, which concluded that Luis was "able to provide a very stable life to her family . . . . [and] has a reputation in town as being an excellent mother."<sup>228</sup> However, because this was not the conclusion the state wanted, Nebraska DHHS requested a second report that "was a little more neutral."<sup>229</sup>

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the department failed to maintain contact with the father or to provide him with any services. It did not keep the father abreast of [his child's] condition or residence, nor did it advise him of the children's new foster care case-worker . . . . The children's guardian *ad litem* did not send him an introductory letter, and the children's therapist never addressed reunification with their father . . . . [T]he department never evaluated him, assisted in his transition from incarceration, or investigated the possibility of coordinating efforts with an agency in Africa . . . . [T]he department's expectation that the father contact the department [was] unreasonable because he did not know who was working with the children.

*Id.* at \*3.

<sup>222</sup> See Abrams, *supra* note 132.

<sup>223</sup> *Id.* Much about Javier's removal is suspicious. When the Alabama Department of Human Resources became involved, rather than return the child and express shock at the women's actions, the Department supported the removal and said that returning to the home was a health hazard. See *id.*; Rosemary Pennington, *Fighting for Javier*, WBHM BIRMINGHAM (Feb. 6, 2004), [http://www.wbhm.org/News/2004/Fighting\\_for\\_Javier.html](http://www.wbhm.org/News/2004/Fighting_for_Javier.html).

<sup>224</sup> Abrams, *supra* note 132.

<sup>225</sup> *Id.* (adding that the baby was "in such bad shape from neglect" that after removal he needed to be admitted to the hospital).

<sup>226</sup> *Id.*

<sup>227</sup> See *id.*

<sup>228</sup> *In re Angelica L.*, 767 N.W.2d at 87 (internal quotation marks omitted).

<sup>229</sup> *Id.* (internal quotation marks omitted); see also *In re M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) (noting that, contrary to the state's assertion that the father "never completed the anger management course[,] . . . not only did the father attend a majority of the sessions of an anger management course, it appears that he has maintained a lifestyle free of domestic violence" and also exposing other conflicting statements by the state about the father's parental bond, housekeeping, and permanent residence); E-mail from

The above examples are telling, but the most shocking illustration of how state child welfare agencies have interfered and influenced termination decisions are cases in which welfare workers alerted ICE officials to a parent's undocumented status to make termination easier.<sup>230</sup> Agencies are well aware that, after a child is removed, a parent's subsequent deportation makes future reunification unlikely and termination almost inevitable.<sup>231</sup> Consequently, parental deportation after removal is one of the most effective means of achieving termination of an immigrant parent's rights and state agencies have taken advantage of this fact.

The deportation of Karen Arriaga is illuminating on this point.<sup>232</sup> Arriaga was an undocumented teenage mother of two whose children were removed by the Florida Department of Children and Families (DCF) based on questionable charges of neglect.<sup>233</sup> After Arriaga's children were taken into protective custody, members of Family Preservation, a welfare group under contract with the Florida DCF told Arriaga that she should go to their office for a supervised visit with her children.<sup>234</sup> When she arrived at the facility, ICE officers were waiting to take her into custody.<sup>235</sup> A week later, Arriaga's parents received a similar call.<sup>236</sup> They, too, reported to the Family Preservation office to visit

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Hilda Lopez, *supra* note 179 (describing how the Massachusetts Department of Family Services "would not contact the Dominican Republic consulate or complete an international home study," and that "after a home study was completed by the appropriate protective agency in the Dominican Republic pursuant to a request by Mother and Mother's counsel, the Juvenile Court Judge failed to recognize it").

<sup>230</sup> See *In re B & J*, 756 N.W.2d at 237–38; Aisling Swift, *Bonita Mom Gets Probation in Neglect Case*, NAPLES DAILY NEWS (Aug. 18, 2009), <http://www.naplesnews.com/news/2009/aug/18/bonita-mom-gets-probation-neglect-case>.

<sup>231</sup> See, e.g., *Anita C.*, 2009 WL 2859068 at \*8 (showing that reunification after deportation is all but impossible because the mother would never be able to demonstrate her ability to provide proper care); *In re B & J*, 756 N.W.2d at 242 (describing deportation as a "de facto termination of parental rights"); *In re Angelica L.*, 767 N.W.2d at 82–83 (noting that the lower court refused immediate reunification "because Maria had been deported to Guatemala"); Swift, *supra* note 230 (noting that deportation will prevent the mother from completing her probation and, with no means of completing her probation, reunification is unlikely).

<sup>232</sup> Swift, *supra* note 230.

<sup>233</sup> See *id.* The neglect charge stemmed from her inability to afford the medical care for her premature infant and her lack of transportation to get the child to her medical appointments. *Id.*

<sup>234</sup> See *id.*

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

with their grandchildren.<sup>237</sup> As Arriaga's mother held her grandchildren, ICE officers arrived.<sup>238</sup>

State actors arranged the deportation of the parents in *In re B & J* in a similar manner.<sup>239</sup> There, a judge ordered the state Department of Human Services (DHS) to provide reunification services to the undocumented immigrant family.<sup>240</sup> DHS objected to reunification and requested termination.<sup>241</sup> After the family court denied this request, DHS reported the parents to ICE officials, who then deported the parents.<sup>242</sup> After the parents were deported, DHS renewed its petition to terminate their parental rights and, because the court found deportation made reunification unlikely, it granted the termination.<sup>243</sup>

In assessing the above actions, it is important to recognize that caseworkers and child welfare agencies have no obligation to report the immigration status of the families they visit, and mandating such reporting is likely unconstitutional.<sup>244</sup> Nevertheless, although such re-

<sup>237</sup> Swift, *supra* note 230.

<sup>238</sup> *Id.*

<sup>239</sup> See *In re B & J*, 756 N.W.2d at 237.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 238 ("The caseworker confirmed that she believed that it had been [DHS's] intention all along to have respondents deported."). During this period, the services provided by DHS were meager and intended to subvert reunification. See *id.* In particular, DHS repeatedly prevented the children from attending scheduled visits with their parents. *Id.*

<sup>242</sup> *Id.* at 237.

<sup>243</sup> *Id.* at 238. The family court found DHS's actions "morally repugnant." *Id.* (internal quotation marks omitted). Nevertheless, the family court agreed that the children's best interests required the termination of their parents' rights. *Id.* Although the department had taken no efforts to find any services for the parents in Guatemala and had made no efforts to contact the respondents, the family court granted the termination petition merely because the children were in the United States. See *id.* The caseworker testified that she "had performed an internet search for possible services in Guatemala" but had "been unable to find any services" for them. *Id.*

<sup>244</sup> See *United States v. Arizona*, 703 F. Supp. 2d 980, 987 (D. Ariz. 2010); *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995). For example, in the 2010 immigration case *U.S. v. Arizona*, Arizona had passed a law requiring its police officers to check immigration status under certain circumstances and make warrantless arrests if there was probable cause to believe a person removable from the United States. 703 F. Supp. 2d at 985. The court struck down the law, holding that it was preempted by federal immigration law; thus, only Congress had the power to pass law regarding immigration. *Id.* at 996. In *League of United Latin American Citizens v. Wilson*, the federal district court ruled that most of Proposition 187 was unconstitutional because it constituted state regulation of immigration. 908 F. Supp. at 786–87. Proposition 187, passed by California voters, was intended to "provide for cooperation between [the] agencies of state and local government with the federal government, and to establish a system of required notification by and between such agencies to prevent illegal aliens in the United States

porting is not required, it can be effective.<sup>245</sup> Reporting a parent's undocumented status increases the likelihood of eventual termination, thus allowing immigrant children to remain in the United States with the possibility of being raised as part of an American family.<sup>246</sup> For welfare workers who believe such a result is in a child's best interest, this is a strong incentive to report undocumented parents to ICE.<sup>247</sup>

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from receiving benefits or public services in the State of California." *Id.* at 763 (internal quotation marks omitted). The provision would have required any

law enforcement, social services, health care and public education personnel to (i) verify the immigration status of persons with whom they come in contact; (ii) notify certain defined persons of their immigration status; (iii) report those persons to state and federal officials; and (iv) deny those persons social services, health care, and education.

*Id.* The court struck down Proposition 187 as unconstitutional because it required state officers to determine immigration status, which amounted to unconstitutional state immigration regulation. *Id.* at 769. According to the Court, state agencies could check the immigration status of persons to potentially deny state benefits but they could not "cooperate" with [federal immigration authorities], solely for the purpose of ensuring that such persons leave the country." *Id.* at 771. Clearly, in both Arriaga's story and the case of *B & J*, the state's cooperation is for just such a purpose. See *In re B & J*, 756 N.W.2d at 237; Swift, *supra* note 230. But see *Fonseca v. Fong*, 84 Cal. Rptr. 3d 567, 579 (Ct. App. 2008) (a different California district court held that notification provisions were constitutional because, unlike Proposition 187, the state did not have to make an independent determination). The above cases concern the constitutionality of statutes requiring notification, but the courts have also held that denials of benefits are unconstitutional. See *Plyler v. Doe*, 457 U.S. 202, 230 (1982). Specifically, in *Plyler v. Doe*, the Supreme Court held it unconstitutional to deny education to the children of undocumented immigrants. *Id.* The lower court in *B & J* and the child welfare agency in Arriaga's story both denied undocumented families state assistance toward reunification—benefits just as important as the educational benefits at issue in *Plyler*. See *id.* at 202; *In re B & J*, 756 N.W.2d at 237; Swift, *supra* note 230.

<sup>245</sup> Rabin, *supra* note 10, at 140 ("One judge commented that attorneys often report to him that they have been unable to locate a client in immigration detention. He described, '[t]here is a certain sense of, "well, it's inevitable what's going to happen." I think that there's a mentality out there with some of [the attorneys]: "What, is he going to reunify?"') (quoting Interview by Nina Rabin with J6, Judge, in Pima County, Ariz.).

<sup>246</sup> See Susan Redden, *Carthage Board Conducts Hearing for Teacher*, JOPLIN GLOBE (Aug. 14, 2009), [http://www.joplinglobe.com/carthage\\_jasper\\_county/x1896309960/Carthage-board-conducts-hearing-for-teacher](http://www.joplinglobe.com/carthage_jasper_county/x1896309960/Carthage-board-conducts-hearing-for-teacher); Riojas, *supra*, note 132. Many of these cases contain legally questionable actions committed by non-state actors. See Redden, *supra*. For example, Bail Romero's son was taken by a local teacher's aide who decided that it was in the son's best interest to be adopted by a local couple and pressured Bail Romero in jail to sign the consent for adoption. See Riojas, *supra* note 132. In June of 2009, the school board accused the aide of immoral conduct for her part in arranging the adoption of Bail Romero's son and recommended her termination. See Redden, *supra*.

<sup>247</sup> See, e.g., *In re B & J*, 756 N.W.2d at 237. In addition, such views are not limited to child welfare workers. See, e.g., Rabin, *supra* note 10, at 138 (describing "'a judge who believed it was his obligation to ask everyone their legal status and then to report'" (quoting Interview by Nina Rabin with J1, Judge, in Pima County, Ariz.).

### E. Appellate Unfitness Decisions

Given the questionable practices and reasoning employed by lower courts and agencies in these immigrant parent termination cases, it is not surprising that, when such decisions have reached appellate courts, they have almost unanimously been overturned.<sup>248</sup> It should also be noted, however, that appeals in undocumented immigrant parental rights termination cases are unlikely.<sup>249</sup> When poor immigrant parents with no proficiency in English or even Spanish are deported to their home countries, their ability to pursue appeals is severely curtailed. Most cases that have been appealed involve parents lucky enough to have acquired exceptional legal assistance prior to deportation.<sup>250</sup>

One such example is *In re Angelica L.*, where the lower court's unfitness determination was reversed by the Nebraska Supreme Court which held that this conclusion was unsupported and therefore improper. The Nebraska Supreme Court explained that the mother must be found unfit before any other considerations could be taken into account.<sup>251</sup> The court made clear that Maria did not "forfeit her parental rights because she was deported" and further added that "[r]egardless of the length of time a child is placed outside the home, it is always the State's burden to prove by clear and convincing evidence that the parent is unfit."<sup>252</sup> In addition, unlike the lower court, the Nebraska Su-

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<sup>248</sup> See, e.g., *In re B & J*, 756 N.W.2d at 237; *In re Angelica L.*, 767 N.W.2d at 80.

<sup>249</sup> Telephone interview with Chris Huck, *supra* note 10. It is difficult to gauge how many cases exist that are not appealed because, as termination cases involve children, they are typically sealed, leaving no record.

<sup>250</sup> *Id.* Two of the most high profile cases, those of Maria Luis and Encarnación Bail Romero, received significant attention because the mothers had the good fortune to become the pro bono clients of DLA Piper, one of the largest legal service providers in the world. See Riojas, *supra*, note 132. Similarly, the cases of Cerila Balthazar Cruz and Felipa Berrera were taken up by the Southern Poverty Law Center, a nationally recognized civil rights organization. See *Cirila Baltazar Cruz, et al. v. Mississippi Department of Hum. Services, et al.*, S. POVERTY L. CENTER, <http://www.splcenter.org/get-informed/case-docket/cruz> (last visited Nov. 20, 2011); *Immigrant Child Returns to Her Mixteco Family*, S. POVERTY L. CENTER, (June 10, 2005), <http://www.splcenter.org/get-informed/news/immigrant-child-returns-to-her-mixteco-family>.

<sup>251</sup> *In re Angelica L.*, 767 N.W.2d at 92 ("[T]he interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the U.S. Supreme Court. Accordingly, before the State attempts to force a breakup of a natural family, over the objections of the parents and their children, the State must prove parental unfitness.").

<sup>252</sup> *Id.* at 92, 94. While the court recognized that deportation can result in a parent's separation from his or her child, it held that separation does not by itself "demonstrate parental unfitness." *Id.* at 92. The court held that separation from one's child for 15 of the past 22 months (the guideline established under the ASFA) does not demonstrate unfitness. *Id.* "Instead, the placement of a child outside the home for 15 or more of the most

preme Court considered the difficulties facing undocumented immigrants like Maria; and was willing to consider the possibility that crossing the border with a newborn “in the belief that they would have a better life here” might actually demonstrate considerable care and concern for one’s child.<sup>253</sup> Consequently, because the court found that “nothing in the record establishes that Maria is an unfit parent,” the court held that the termination of Maria’s parental rights was erroneous.<sup>254</sup>

Other appellate reversals reveal similar concerns.<sup>255</sup> In *In re V.S.*, The Court of Appeals of Georgia reversed the juvenile court’s unfitness determination, finding it improper to base a termination decision on the fact that the father “is an illegal alien and is subject to deportation.”<sup>256</sup> Similarly, in *In re B & J*, the Supreme Court of Michigan reversed the family court’s unfitness decision and refused to allow the parents’ deportation to “constitute[] an improper, de facto termination of respondents’ parental rights.”<sup>257</sup> The court explained that, “to comply with the guarantees of substantive due process, the state must prove parental unfitness by ‘at least clear and convincing evidence’ before terminating a respondent’s parental rights.”<sup>258</sup> The court then found

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recent 22 months under § 43–292(7) merely provides a guideline for what would be a reasonable time for parents to rehabilitate themselves to a minimum level of fitness.” *Id.* In addition, the court noted that “this circumstance would not exist had the State allowed Maria to take the children with her to Guatemala.” *Id.* at 94. The opinion also notes the lack of assistance Luis received from the state that made her compliance with the reunification plan nearly impossible. *In re Angelica L.*, 767 N.W.2d at 94–96. The case plan included requirements such as obtaining employment and suitable housing but also requirements such as attending parenting classes and completing a psychological evaluation. *Id.* at 83. Luis never received a copy of the plan, DHHS told her that arranging classes internationally was too difficult for DHHS, and she would have to take the initiative herself. *Id.* at 84, 95. Furthermore, because of the difficulties posed by her location, DHHS left it up to Maria to prove compliance with the plan. *Id.* at 84. Hannah, the social worker assigned to the case, admitted it was her responsibility to monitor Luis’s progress but admitted “that she could not do so because of Maria’s location.” *Id.* at 84. She later determined that Maria had failed to comply with the case plan. *Id.*

<sup>253</sup> *Id.* at 93. In addition, the court was also prepared to consider how the fear of deportation might have influenced Luis’s actions and to find that it excused some of her parental mistakes. *See id.*

<sup>254</sup> *Id.*

<sup>255</sup> *See In re V.S.*, 548 S.E.2d at 494; *In re B & J*, 756 N.W.2d at 242.

<sup>256</sup> *See In re V.S.*, 548 S.E.2d at 493.

<sup>257</sup> *In re B & J*, 756 N.W.2d at 241–42. The court recognized that once the parents were deported, it was “all but certain that respondents would be permanently separated from their children and that respondents would become unable to provide proper care and custody.” *Id.* at 242.

<sup>258</sup> *Id.* at 241 (quoting *Santosky v. Kramer*, 455 U.S. 745, 748 (1982)).

that the family court erred in attributing such a showing to the Michigan DHS.<sup>259</sup>

Even at the appellate level, however, not all cases are reversed.<sup>260</sup> When such decisions are affirmed, the appellate courts do so in the same manner as the lower courts: they ignore the fitness requirement and focus entirely on the question of the child's best interest.<sup>261</sup> For example, in *Perez-Velasquez v. Culpeper County Department of Social Services*, the Virginia Court of Appeals affirmed the trial court's holding that the deported father had, "without good cause, failed to maintain continuing contact with and to provide or substantially plan for the future of the child[ren]."<sup>262</sup> The court further held that it "is clearly not in the best interests of a child to spend a lengthy period of time waiting to find out when, or even if, a parent will be capable of resuming his [or her] responsibilities."<sup>263</sup> Similarly, in *Anita C.*, the appellate court agreed that the child's best interest was the only relevant consideration and that the mother's fitness was irrelevant.<sup>264</sup>

These above cases demonstrate the extreme lengths to which some courts and agencies will go to terminate parental rights in favor of what they perceive to be the best interest of the child.<sup>265</sup> Despite the obvious intention to do what is good for the child, however, employing a best interest standard does not guarantee that termination decisions will be made according to the child's actual best interest.<sup>266</sup>

<sup>259</sup> *Id.* at 242.

<sup>260</sup> *See, e.g., Anita C.*, 2009 WL 2859068, at \*11; *Perez-Velasquez*, 2009 WL 1851017, at \*4.

<sup>261</sup> *See Anita C.*, 2009 WL 2859068, at \*9–10; *Perez-Velasquez*, 2009 WL 1851017, at \*2.

<sup>262</sup> 2009 WL 1851017, at \*2 n.1 (quoting VA. CODE ANN. § 16.1-283 (2011)).

<sup>263</sup> *Id.* at \*2 n.1, \*3 (quoting *Kaywood v. Halifax Cnty. Dep't of Soc. Servs.*, 394 S.E.2d 492, 495 (Va. Ct. App. 1990)).

<sup>264</sup> *See Anita C.*, 2009 WL 2859068 \*8–9. Other scholars have noted the assumptions regarding the unfitness of African-American families. *See, e.g.,* Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 131 (1999) ("Poor black mothers are stereotyped as deviant and uncaring; they are blamed for transferring a degenerate lifestyle of welfare dependency and crime to their children. Black fathers are simply thought to be absent.") (internal citations omitted). In this sense, undocumented parents are treated similarly to other poor, non-white parents. *See, e.g., In re V.S.*, 548 S.E.2d at 493; Roberts, *supra*, at 131. Yet, as these cases show, immigration status makes such actions more likely and harder to combat. *See In re V.S.*, 548 S.E.2d at 493; *In re B & J*, 756 N.W.2d at 242.

<sup>265</sup> *See Anita C.*, 2009 WL 2859068, at \*9–10; *Perez-Velasquez*, 2009 WL 1851017, at \*2.

<sup>266</sup> *See Anita C.*, 2009 WL 2859068, at \*9–10; *Perez-Velasquez*, 2009 WL 1851017, at \*2. As discussed below, this question has been explored in the context of African-American removals and terminations, and it was in the context of the removal of African-American children that best interest considerations and the Children's Rights Movement evolved. Although African-American terminations demonstrate a similar elevation of best interests

## V. BEST INTERESTS AND BETTER PARENTS

The United States has a long history of removal decisions that are, in hindsight, unwise or even harmful.<sup>267</sup> Best interest standards are subjective and are susceptible to bias.<sup>268</sup> Consequently, even if choosing children's rights over parental rights will benefit children in theory, this does not mean they will result in better outcomes in practice.<sup>269</sup>

### A. Parental Rights vs. Children's Rights

The primary purpose of the parental rights doctrine and the fitness standard is to ensure parental autonomy in raising children.<sup>270</sup> The strong protection afforded to parental rights is justified by the belief that this protection also benefits children and the state.<sup>271</sup> The doctrine contains the following presumptions: (1) children benefit because the biological parents have strong incentives to take care of their children, and (2) the state benefits because parental independence from the state enables them to raise children to be independent citizens equipped with the ability to make independent personal and political choices.<sup>272</sup> In addition, the parental rights doctrine also incorporates the belief that independence from state interference guarantees a meaningful right to privacy by ensuring that many of the most intimate aspects of a persons'

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over parental rights, the removals and terminations in the immigrant context are quite different.

<sup>267</sup> See STEPHEN O'CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED* 202 (2001); Marcia Zug, *Dangerous Gamble: Child Support, Casino Dividends, and the Fate of the Indian Family*, 36 WM. MITCHELL L. REV. 738, 771-74 (2010).

<sup>268</sup> See, e.g., *In re V.S.*, 548 S.E.2d 490, 494 (Ga. Ct. App. 2001); *In re B & J*, 756 N.W.2d 234, 242 (Mich. Ct. App. 2008).

<sup>269</sup> See, e.g., *In re V.S.*, 548 S.E.2d at 494; *In re B & J*, 756 N.W.2d at 242.

<sup>270</sup> See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); see also Bruce A. Boyer & Steven Lubet, *The Kidnapping of Edgardo Mortara: Contemporary Lessons in the Child Welfare Wars*, 45 VILL. L. REV. 245, 253 (2000) (stating that "[c]entral to the Court's decision in *Santosky* is its view that any effort to sever the parent-child relationship . . . , must begin with an inquiry that is parent-focused").

<sup>271</sup> See Katherine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 712 (2008) (discussing the assumptions that children "benefit from strong parental rights and . . . are hurt when a Big Brother state starts dictating parenting practices").

<sup>272</sup> *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979) ("[P]ages of human experience . . . teach that parents generally do act in the child's best interests."); Appell, *supra* note 35, at 709 (explaining that "it is the parent's role to raise and nurture children to become mature adults who are able to exercise political choice . . . [and] this role requires a measure of independence from the state"); see also Mary L. Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 85 (1995).



life remain private.<sup>273</sup> However, the assumption that parents will always act in their children's best interests is problematic. Parental rights can conflict with children's rights and, in those circumstances, the choice to protect parental rights may not be in a child's best interest.<sup>274</sup>

The above termination cases exemplify this dilemma. In these cases, the courts refused to uphold the parents' rights to the care and custody of their child, finding that such a decision would not be in that child's best interest.<sup>275</sup> Instead, each court viewed termination as preferable.<sup>276</sup> The justifications given in these cases for why termination is in a child's best interest can be broken down into three distinct but related categories. First, it is not in a child's best interest to move to a foreign country he or she may never have visited, where the child may not speak the language, and where the child may have much more limited opportunities.<sup>277</sup> Second, it is in a child's best interest to remain in America because it is home, the standard of living is higher, and the opportunities are better.<sup>278</sup> Third, it is in a child's best interest to remain in the United States because the child may have become attached to his or her current caregiver, the caregiver may wish to adopt the child, and adoption is in the child's best interest because it will enable the child to become part of an American family.<sup>279</sup> These justifications

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<sup>273</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (extending the zone of privacy to cover same sex sexual relationships); *Roe v. Wade*, 410 U.S. 113, 165–66 (1973) (recognizing a right to abortion); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending this right to unmarried couples); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (recognizing the right to privacy in the context of intimate marital relations); Appell, *supra* note 35, at 708 (noting this right is based on the idea that “family relationships and issues are protected because families are intimate associations created and controlled by autonomous adults”). Justice Brandeis famously defined the right to privacy as the “right to be let alone.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

<sup>274</sup> See *Anita C. v. Superior Court*, No. B213283, 2009 WL 2859068, at \*9–10 (Cal. Ct. App. Sept. 8, 2009); *Perez-Velasquez v. Culpeper Cnty. Dep’t of Soc. Servs.*, No. 0360-09-4, 2009 WL 1851017, at \*3 (Va. Ct. App. June 30, 2009). For a further discussion of this conflict between parental rights and children's and state interests, see Zug, *supra* note 15, at 1180–82.

<sup>275</sup> See *Anita C.*, 2009 WL 2859068, at \*9–10; *Perez-Velasquez*, 2009 WL 1851017, at \*3.

<sup>276</sup> See *Anita C.*, 2009 WL 2859068, at \*9–10; *Perez-Velasquez*, 2009 WL 1851017, at \*3.

<sup>277</sup> See Rabin, *supra* note 10, at 139 (“[The lawyer] went on to describe a case in which a child would need ongoing medical treatment and the parents were in Agua Prieta. The judge was very reluctant to return the child to her parents because of concerns about the availability of care. The attorney recalled, ‘[w]e were saying that she can get treatment in Mexico, it’s not like medieval Europe. [And the] judge said, “Well, I don’t know about that.”’) (quoting Interview by Nina Rabin with A6, Attorney, in Pima County, Ariz.).

<sup>278</sup> See *Anita C.*, 2009 WL 2859068, at \*9.

<sup>279</sup> Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 439–40 (2009) (describing this as the “Improved Life Chances Narrative,” which “describe[s] the opportunities for adoptive

frequently overlap, and many termination decisions rely on a combination of the three.<sup>280</sup>

For example, in *In re Angelica L.*, the state presented evidence to demonstrate that “living in Guatemala would put [the children] at a disadvantage compared to living in the United States.”<sup>281</sup> The state called a clinical psychologist to testify that, “if the children were sent to Guatemala, they would ‘experience culture shock, disorientation, fearfulness, sadness and anger.’”<sup>282</sup> He also “testified that the standard of living in Guatemala is lower than the standard in the United States, the people are poorer, and there are less economic opportunities.”<sup>283</sup> The purpose of this testimony was to contrast the life the children would have in Guatemala with the life the children would have with their foster family in the United States.<sup>284</sup> After hearing this evidence, the trial court decided that the children should not return to Guatemala and terminated the mother’s parental rights.<sup>285</sup> The court held that because “neither Angelica nor Daniel [were] familiar with Guatemala,” and because they “were thriving in the only locality they have ever known with the only parental figures they have ever known,” termination was in their best interests.<sup>286</sup>

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children as improved in the United States, and in doing so, implying the superiority of upper- and middle-class parents to poor birth parents”); see also Rashmi Goel, *From Tainted to Sainted: The View of Interracial Relations as Cultural Evangelism*, 2007 Wis. L. Rev. 489, 526 (describing the case of Anna Mae He, and explaining that her foster parents, the “Bakers, were determined to keep Anna Mae, not just because they loved her, but because they believed that returning her to her biological parents would force her to be Chinese, when she had the opportunity to be American”).

<sup>280</sup> See Goel, *supra* note 279, at 522 (discussing how notions of “foreignness and exoticism” can influence custody decisions and describing the competing interests in these cases as between “family unity and the desire consistent with the Missionary-Heathen paradigm, to save children of color”).

<sup>281</sup> *In re Angelica L.*, 767 N.W.2d 74, 94 (Neb. 2009). Similarly, in *Fairfax County Department of Family Services v. Ibrahim*, the state argued for termination based on the believed inferiority of the home and services that the father could provide to his children in Ghana. See No. 0821-00-4, 2000 WL 1847638, at \*3 (Va. Ct. App. Dec. 19, 2000). The state made this argument without offering any “information about the situation in Ghana” and without making any “efforts to determine the conditions there.” *Id.* The state’s argument was simply based on assumptions regarding the inferiority of life in Ghana. See *id.*

<sup>282</sup> *In re Angelica L.*, 767 N.W.2d at 84.

<sup>283</sup> *Id.* at 85. He was, however, unable to answer questions when asked about the educational and athletic opportunities available in Guatemala. See *id.*

<sup>284</sup> See *id.*

<sup>285</sup> See *id.* at 87–88.

<sup>286</sup> See *id.* at 88. On appeal the court rejected such considerations, holding that “whether living in Guatemala or the United States is more comfortable for the children is not determinative of the children’s best interests . . . . [T]he ‘best interests’ of the child

In *Anita C. v. Superior Court*, the Los Angeles County Superior Court found it was in the child's best interest to remain with foster parents because the foster parents wished to adopt him and could better provide for him.<sup>287</sup> Specifically, the court held that "[t]heir home is virtually the only one he has ever known and, not surprisingly, he has become extremely bonded with them."<sup>288</sup> Similarly, at Bail Romero's termination hearing, the Missouri Court of Appeals contrasted the immigrant mother with the potential adoptive mother.<sup>289</sup> The court described Bail Romero as having little to offer her son Carlos, stating that "[t]he only certainties in [Mother's] future is that she will remain incarcerated until next year, and that she will be deported thereafter."<sup>290</sup> The court contrasted this bleak future with that of the prospective adoptive parents, who made a "comfortable living, had rearranged their lives and work schedules to provide Carlos a stable home, and had support from their extended family."<sup>291</sup> Consequently, the court held it was in Carlos's best interest to be placed with the adoptive family and terminated Bail Romero's parental rights.<sup>292</sup>

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standard does not require simply that a determination be made that one environment or set of circumstances is superior to another." *Id.* at 94. The court then explained that

unless Maria is found to be unfit, the fact that the state considers certain adoptive parents, in this case the foster parents, better, or this environment better, does not overcome the commanding presumption that reuniting the children with Maria is in their best interests—no matter what country she lives in. As we have stated, this court has never deprived a parent of the custody of a child merely because on financial or other grounds a stranger might better provide.

*Id.* (internal quotation marks omitted).

<sup>287</sup> See *Anita C.*, 2009 WL 2859068, at \*9–10.

<sup>288</sup> *Id.* at \*9.

<sup>289</sup> See *In re C.M.B.R.*, No. SD 30342, 2010 WL 2841486, at \*4 (Mo. Ct. App. July 21, 2010), *rev'd* 332 S.W.3d 793 (Mo. 2011).

<sup>290</sup> *Id.*

<sup>291</sup> Thompson, *supra* note 10.

<sup>292</sup> See *In re C.M.B.R.*, 2010 WL 2841486, at \*4. The story of Marta Alonzo is also similar. See Pennington, *supra* note 223. There, the mother's alleged unfitness was simply a ruse to separate Alonzo from her child, deport her back to Guatemala, and allow her son to be adopted by a white, middle class, American family. See *id.* Before the mother had any chance to remedy the alleged grounds that led to a finding of unfitness, the child welfare agency had the adoption paperwork ready. See *id.*; see also *In re M.M.*, 587 S.E.2d 825, 832 (Ga. Ct. App. 2003) ("The court terminated the father's parental rights[,] . . . determining that the father had done nothing to legalize his residency in the United States, that even if he later attempted to do so, he would face deportation, that the child could then be returned to protective custody or taken with her father to 'an unknown future in Mexico,' and that it was unwilling to subject [him] to those possibilities."); *In re B & J*, 756 N.W.2d at 241 (revealing the state's argument that termination was in "the children's best interests because the children will have a better and more prosperous life in the United States than

These cases exemplify the belief that remaining in the United States and growing up with a “typical” American family is in the best interests of immigrant children.<sup>293</sup> However, just because these beliefs are strongly held does not mean they are correct. There is a long history of prejudice towards immigrant and minority families and the belief in the inferiority of their caregiving.<sup>294</sup> This history has demonstrated that a best interest standard is easily susceptible to cultural and racial conceptions of what is in a child’s best interest.<sup>295</sup> The separation of immigrant families may simply be the most recent iteration of this phenomenon.<sup>296</sup>

### B. *Best Interest Considerations and Indian Children*

The history of separating Indian children from their parents provides a compelling example of how biases may influence perceptions and decisions regarding a child’s best interest. The nineteenth century witnessed many attempts to solve the “Indian problem,” typically described as the Indian people’s failure to accept Anglo-American “civilization.”<sup>297</sup> By the end of the century, reformers agreed that the best

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in Guatemala”); Interview with Linda Brandmiller, Dir. of Immigration Servs., Catholic Charities Archdiocese of San Antonio (Aug. 13, 2009) (describing a Texas case where the court refused to return a special needs child to fit parents because the medical services available in Mexico were considered inadequate and he was doing well with his foster parents).

<sup>293</sup> See *In re C.M.B.R.*, 2010 WL 2841486, at \*4; Julian et al., *supra* note 126, at 31. In fact, this message is so strong it may be influencing immigrant family cases where deportation is not even an issue. See Appell, *supra* note 126, at 778. An immigrant, Spanish speaking grandmother—raising a large family and wanting to provide for her newborn granddaughter—lost custody in favor of

the Whiter, more middle class family—the English-speaking family with a higher socioeconomic status—in whose care N.S. would become Whiter than she might with her LEP, working poor, single grandmother supporting seven children. The assimilationist force of the child welfare system thus drove the case in the agency and lower court, despite Nevada’s clear policy to place children with kin.

*Id.*

<sup>294</sup> See Appell, *supra* note 126, at 765; Julian et al., *supra* note 126, at 31.

<sup>295</sup> See Appell, *supra* note 128, at 765; Julian et al., *supra* note 126, at 31.

<sup>296</sup> Rabin, *supra* note 10, at 137–38 (“[N]early all of the twenty-six CPS workers who responded [to a survey] thought the undocumented parents would be more likely to have problems with domestic violence, and roughly one quarter thought they would be more likely to have problems with child neglect, abandonment, substance abuse, and mental health. These figures suggest that a significant number of caseworkers assume negative characteristics of immigrant families in the absence of any individualized basis for the assumption.”).

<sup>297</sup> Appell, *supra* note 126, at 762. This same criticism is often directed at immigrant families. See *id.* at 762–63.

method for saving the Indian people was to separate children from their parents and tribes.<sup>298</sup> These reformers considered separation to be in a child's best interest because it would protect them from the damaging influences of their parents and provide them with the so-called benefits of civilization.<sup>299</sup> They believed that once removed from the harmful influences of their families, Indian children would be able to avoid the poverty and other negative consequences that increasingly characterized tribal life.<sup>300</sup>

The initial separations of Indian children from their families typically involved placement in boarding schools.<sup>301</sup> By the 1950s, the federal government finally acknowledged that removal to these schools harmed Indian children.<sup>302</sup> Nevertheless, the belief that removal was in the best interests of Indian children continued.<sup>303</sup> The Indian Adoption Project, a joint effort between the Bureau of Indian Affairs and the Child Welfare League, replaced the boarding schools.<sup>304</sup> The purpose of this program was to facilitate the adoption of Indian children by non-Indian families, something both organizations advocated as in the children's best interests.<sup>305</sup>

Congress finally curtailed the practice of separating Indian children from their families in 1978 with the passage of the Indian Child Welfare Act.<sup>306</sup> The Act recognized the devastation that such removals were having on the tribes and also recognized the legitimacy and value of Indian families and their care-giving practices.<sup>307</sup> Scholars and other

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<sup>298</sup> See *id.* at 762.

<sup>299</sup> See Zug, *supra* note 267, at 774. Such reformers believed that as long as Indian children were "associating all their highest ideals of manhood and womanhood with fathers who are degraded and mothers who are debased," they would never become healthy, productive members of society. *Id.* (quoting Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 360 (1986)).

<sup>300</sup> See Zug, *supra* note 267, at 774–76. For example, Nineteenth century Indian families met public condemnation for allowing women to work, for sharing parenting duties among extended family members, and for their resistance to corporal punishment. See *id.* at 770–74.

<sup>301</sup> *Id.* at 775.

<sup>302</sup> See *id.* at 776–77.

<sup>303</sup> See *id.* at 777.

<sup>304</sup> See *id.* at 777 n.221.

<sup>305</sup> See Zug, *supra* note 267, at 777. The project was also strongly supported by child welfare workers who, during the 1960s and '70s, "removed 25% to 35% of Indian children from their homes to foster and adoptive homes . . ." Appell, *supra* note 126, at 762.

<sup>306</sup> See generally Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1963 (2006)).

<sup>307</sup> See *id.* § 2, 25 U.S.C. § 1901. For example, Congress recognized that the value of Indian kinship care arrangements is common in Indian families which social workers had previously viewed as neglectful. See *Indian Child Welfare Act of 1978: Hearings Before the Subcomm. on*

child advocates in modern times are sharply critical of these former Indian policies.<sup>308</sup> What was once considered a bad parent is now acknowledged to simply be a different parent.<sup>309</sup>

### C. *Best Interests and Nineteenth Century Immigrant Children*

A second historic example is even more reminiscent of the removal practices modern courts and child welfare agencies are employing with respect to immigrant children. In the nineteenth century, thousands of children were placed on “orphan trains” and sent to the homes of families in the West and Midwest.<sup>310</sup> Despite the label orphan, many of these children were not orphans.<sup>311</sup> “They were, instead, mostly children of Catholic recent immigrants, sent away by wealthy, Protestant ‘child savers.’”<sup>312</sup> These reformers considered the existence of the children’s parents irrelevant because, according to the child savers, the parents were undesirable.<sup>313</sup> The child savers believed their actions were in the children’s best interests.<sup>314</sup> At the time, their actions seemed acts “of nearly unassailable wisdom and compassion.”<sup>315</sup> Over time, however, these “savers” have come to be regarded as “cruelly indifferent to the very children [they] had been designed to help.”<sup>316</sup>

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*Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 96–42, at 69 (1978) (statement of LeRoy Wilder, Associate Attorney); H.R. REP. NO. 95-1386, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

<sup>308</sup> See, e.g., Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children’s Participation*, 50 ARIZ. L. REV. 127, 133 (2008) (describing policies from boarding schools to the Indian Adoption Project as “misguided paternalism, ethnocentrism and outright racism”).

<sup>309</sup> See Zug, *supra* note 267, at 770.

<sup>310</sup> See O’CONNOR, *supra* note 267, at 202. By 1929 when the last orphan train departed, approximately 250,000 children had been sent west. *Id.* at xvii.

<sup>311</sup> *Id.* at 98–99 (“Victorian families used orphanages as places to park their children during family crises. A substantial portion of children in orphanages were there only for a year or two . . .”); see also *id.* at 107 (describing how children were placed on orphan trains without inquiry into the claims of orphanhood).

<sup>312</sup> GUGGENHEIM, *supra* note 34, at 182; see Appell, *supra* note 126, at 763 (stating that these “saved” children were primarily from immigrant, Catholic working class and poor families headed by single mothers”).

<sup>313</sup> See LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 10–11 (1999). “Children who appeared to child savers as uncared-for strays were often contributing to their families’ incomes by begging, peddling, gathering castoffs for use or resale, selling their services, or stealing.” *Id.* The Catholic Charities did not make such severe moral judgments and instead tried to help the families rather than blaming single mothers or treating them as “fallen.” See *id.* at 15.

<sup>314</sup> See Appell, *supra* note 126, at 763–64.

<sup>315</sup> O’CONNOR, *supra* note 267, at xix.

<sup>316</sup> *Id.*

### D. *The Disproportionality Movement*

As the above examples demonstrate, the removal of minority children from their homes is not unprecedented. It has happened in the past and is continuing in the present.

A modern movement, termed the disproportionality movement, has raised concerns of bias in the context of African-American parent termination cases.<sup>317</sup> The disproportionality movement arose as a reaction to the growing emphasis on children's rights.<sup>318</sup> It posits that one of the consequences of the "systemic biases in child welfare system decision-making" is that children are being removed from their families unnecessarily.<sup>319</sup> In particular, the movement focuses on the disproportionate number of African-American children in foster care as compared to their percentage of the general population.<sup>320</sup> The movement's proponents argue that this "disproportionality" demonstrates a bias in removal decisions.<sup>321</sup>

Many studies have demonstrated how bias can and does affect decision-making.<sup>322</sup> Child welfare decisions by their nature are highly subjective and therefore can provide an easy avenue for expressing bias.<sup>323</sup>

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<sup>317</sup> See Bartholet, *supra* note 14, at 871. Professor Bartholet appears to have been the first to refer to disproportionality arguments as representing a movement. *Id.*

<sup>318</sup> See GUGGENHEIM, *supra* note 34, at 5–6; Bartholet, *supra* note 14, at 871. Professor Guggenheim argues it

is not coincidental that the call for the permanent banishment of birth parents reached its zenith when the foster care population reached an unprecedented high of being nonwhite. As a result of this major policy change [seeking to terminate parents], an official goal of U.S. policy today is to socially engineer the makeup of the families raising poor, nonwhite children.

*Id.* at 205. Guggenheim notes that "of the 42,000 children in [New York City] foster care in December 1997, only 3.1 percent were categorized as 'non-Hispanic white.'" *Id.* This "means that, somehow or other, New York City has found a way to maintain a child welfare system for its white population that treats placement in foster care as an extremely rare event." *Id.*

<sup>319</sup> See Bartholet, *supra* note 14, at 873, 878–79.

<sup>320</sup> *Id.* at 871.

<sup>321</sup> Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 112 (2008). The purpose of the disproportionality movement is to focus attention on the problem of racism in the child welfare system. See *id.* But see Bartholet, *supra* note 14, at 905 (arguing that such bias may be less likely in the child welfare system because of the high number of black and other minority social workers).

<sup>322</sup> See, e.g., Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 975 n.31 (2006) (noting "[t]he legal literature on implicit bias is by now enormous"); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1512–14 (2005) (describing studies revealing implicit bias); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–23 (1987).

<sup>323</sup> See GORDON, *supra* note 313, at 10–11; Appel, *supra* note 126, at 764–65.

Consequently, the movement's adherents argue that biased beliefs regarding the inferiority of African-American families and their caregiving cause child welfare workers to disproportionately and unnecessarily remove African-American children from their parents.<sup>324</sup> Welfare workers perceive these removals to be in the children's best interests because they believe they are removing children from "bad" parents and making them available for adoption by "good" parents.<sup>325</sup> Scholars such as Michelle Goodwin have noted, however, that adoption—at least in the African-American context—is not the panacea imagined.<sup>326</sup> Instead, many of these children will spend the remainder of their childhoods in foster care, the negative effects of which are numerous and well documented.<sup>327</sup> Therefore, although the increase in removals was

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<sup>324</sup> Bartholet, *supra* note 14, at 873. In the context of African-American families, such biases frequently pertain to beliefs that African-American parents are more likely to take drugs and physically abuse their children than their white counterparts. See, e.g., Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, 4 HARVARD BLACKLETTER J. 9, 10–15 (1987); Dixon, *supra* note 321, at 117–18 (discussing studies demonstrating that African-American children were more likely to have skeletal surveys done to check for fractures and more likely to be tested for drugs); Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 442 (2004) (reviewing RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003)) (noting "empirical evidence indicates that child welfare professionals view Black families as less viable, less resourceful, and, consequently, in need of coercive state intervention"). See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 7–10 (2002) (describing the disproportionate number of African-American children in the child welfare system).

<sup>325</sup> See Appel, *supra* note 126, at 765. As scholars such as Professor Martin Guggenheim have noted, a court's use of the best interest test is often influenced by its own value judgments. See, e.g., *Painter v. Bannister*, 140 N.W.2d 152, 156 (Iowa 1966) (denying custody to fit father based on "unstable, unconventional, arty, Bohemian" lifestyle); GUGGENHEIM, *supra* note 34, at 39–40.

<sup>326</sup> See Michele Goodwin, *Relational Markets in Intimate Goods*, 44 TULSA L. REV. 803, 821 (2009). For a discussion of the illusory nature of adoption, see *id.* at 821 n.133 ("As a contemporary model, the disproportionately low adoption rate for black children in foster care gives some indication of the continued illusory nature of adoption as a specialized child-focused welfare service model.") (citing Richard P. Barth, *Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 288 (1997) (noting the adoption rates of white children in the Michigan foster care system are three times greater than black children)); Jane C. Murphy, *Protecting Children by Preserving Parenthood*, 14 WM. & MARY BILL RTS. J. 969, 982 (2006) (noting that "children left behind in permanent foster care status are disproportionately African American and, as they age, are practically unadoptable"); see also *Caring for Children: Who Will Adopt the Foster Care Children Left Behind?*, URB. INST., (June, 2003), [http://www.urban.org/UploadedPDF/310809\\_caring\\_for\\_children\\_2.pdf](http://www.urban.org/UploadedPDF/310809_caring_for_children_2.pdf) ("Compared with children still in foster care, those who are adopted are younger and more likely to be female, Caucasian, and Hispanic . . . [T]hose awaiting adoption tend to be . . . older, male, and black . . .").

<sup>327</sup> See Murphy, *supra* note 326, at 982.



spurred by the desire to help children, these removals may be working against their best interests.<sup>328</sup>

### E. *Good Parents vs. Immigrant Parents*

The separation of immigrant parents from their children seems to be based on similar assumptions regarding good parents and the belief that children have the right to be raised by good parents.<sup>329</sup> Obviously the definition of a good parent is subjective.<sup>330</sup> Typically, a good parent is defined in relation to dominant cultural norms.<sup>331</sup> According to Professor Annette Appell, this means “married; White; Christian (preferably Protestant); Anglo; and relatedly, English-speaking; and middle class.”<sup>332</sup> Defining a good parent in relation to these norms can be particularly problematic for immigrant parents because these norms may differ significantly from the norms present in their country of origin.<sup>333</sup> For example, American norms hold that families should be independent and not too reliant on extended family or community members.<sup>334</sup> As Professor Naomi Cahn has noted, this means that parents, and particularly mothers, are expected “to be primarily responsible for their children.”<sup>335</sup> Consequently, although sharing child care responsibilities among extended family is common throughout much of the world, parents living in the United States who delegate that responsibility to others, such as a grandparent or an older child may be considered bad parents.<sup>336</sup>

<sup>328</sup> *Id.*

<sup>329</sup> See Goel, *supra* note 279, at 526–527.

<sup>330</sup> See *id.* at 526 (describing how, “[b]ecause of their own bias against the culture and way of life in China, the [foster parents] felt the need to rescue Anna Mae from a life there”).

<sup>331</sup> See *id.*

<sup>332</sup> Appell, *supra* note 126, at 765; see also Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 904–05 (1996) (describing how the image of motherhood in black and Hispanic cultures is different from the dominant norm and, as a result, these families are viewed “as failed versions of the white, male-headed nuclear family”).

<sup>333</sup> See Appell, *supra* note 126, at 765.

<sup>334</sup> See *id.* This is especially problematic for immigrant parents who often come from societies where it is common for children to be raised by grandparents and where older siblings are frequently made responsible for their younger siblings’ care. See Solangel Maldonado, *The Role of Race, Ethnicity and Culture in Custody Disputes* 14 (unpublished manuscript) (on file with the author) (noting that “in Asia and Latin-America, older children are routinely given significant responsibilities for their younger siblings’ care”).

<sup>335</sup> See Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 822 (2000).

<sup>336</sup> See Maldonado, *supra* note 334, at 14.

Similarly, living arrangements that are common throughout the world, such as two families sharing a home or three people sharing a bedroom, can be viewed with suspicion when practiced in the United States.<sup>337</sup> Accommodations that do not afford children the level of privacy typical in American families are treated with concern by American courts and child welfare agencies.<sup>338</sup> In addition, educational deficiencies or medical conditions that are often left untreated in countries with more limited resources will be viewed with serious concern by U.S. courts and agencies.<sup>339</sup> What was a rational decision in a parent's home country may be considered unjustified by American institutions.<sup>340</sup> These examples illustrate how courts and welfare agencies that evaluate immigrant parents in relation to white, middle class, English-speaking norms may be more likely to judge parents unfit.<sup>341</sup>

Although divergence from these norms creates difficulties for many minority parents, it is particularly problematic for immigrant parents.<sup>342</sup> In most cases, explicit bias against minority groups is con-

<sup>337</sup> *Id.* at 14 (citing *Rico v. Rodriguez*, 120 P.3d 812 (Nev. 2005)).

<sup>338</sup> *Id.* at 14–15.

<sup>339</sup> *Id.* at 15.

<sup>340</sup> See Goel, *supra* note 279, at 527 (noting that the guardian ad litem's best interest determination was influenced by the fact that "she had read a book about Chinese girls being placed in orphanages and consequently was concerned that the parents wanted to return to China . . .").

<sup>341</sup> See Appell, *supra* note 126, at 770. The perceived unfitness of parents who do not speak English is demonstrated by the lack of child welfare officials that speak other languages. See *id.* The result is that only English-speaking parents are able to receive meaningful assistance. See *id.* (describing the child welfare system in Las Vegas and noting the "rarity of Spanish-speaking (and other foreign language speaking) case workers, a dearth of translators on staff in child welfare offices, and perhaps an absence of Spanish-speaking teams of social workers in the child welfare system despite [its] geographical concentrations of Latino communities"); see also Julian et al., *supra* note 126, at 31 (observing that the "parenting styles of Caucasian, middle-class parents are then used as the benchmark against which other groups are compared, with an assumption of Caucasian superiority"). It should be noted that these assumptions are not only relevant in termination cases but are frequently applied in custody disputes between biological parents. See, e.g., *Rico*, 120 P.3d at 818–19 (giving custody preference to the permanent resident father over the undocumented immigrant mother); *Ramirez v. Ramirez*, Nos. 2005-CA-002554-ME, 2006-CA-000010-ME, 2007 WL 1192587, at \*3 (Ky. Ct. App. Apr. 13, 2007) (finding that the determination of a father's immigration status was appropriate in a custody hearing).

<sup>342</sup> See Appell, *supra* note 126, at 765. Bias against undocumented immigrants tends to focus on Hispanic immigrants because they comprise the majority of the undocumented immigrant population. See *id.* at 768; Julian et al., *supra* note 126, at 31. According to the Urban Institute, "Mexicans make up over half of undocumented immigrants—57 percent of the total, or about 5.3 million. Another 2.2 million (23 percent) are from other Latin American countries. About 10 percent are from Asia, 5 percent from Europe and Canada, and 5 percent from the rest of the world." Jeffrey S. Passel et al., *Undocumented Immigrants: Facts and*

demned.<sup>343</sup> Bias against immigrants and undocumented immigrants in particular, however, is widely viewed as acceptable.<sup>344</sup> Such discrimination is not only tolerated, it is frequently encouraged.<sup>345</sup> Politicians are

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Figures, URBAN INSTITUTE IMMIGRATION STUDIES PROGRAM (Jan. 12, 2004), [http://www.urban.org/UploadedPDF/1000587\\_undoc\\_immigrants\\_facts.pdf](http://www.urban.org/UploadedPDF/1000587_undoc_immigrants_facts.pdf).

<sup>343</sup> See Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1054 (2009). Even individuals who harbor personal feelings of bias toward minorities recognize society's disapproval of such feelings and are increasingly unwilling to acknowledge that their actions are the result of biased beliefs and assumptions. See *id.* (noting that the "invocation of unconscious bias levels neither accusation nor blame, so much as it identifies a quasi-medical ailment that distorts thinking and behavior"). As Professors Banks and Ford note, "[p]eople may be willing to acknowledge the possibility of unconscious bias within themselves, even as they would vigorously deny harboring conscious bias." *Id.*

<sup>344</sup> See David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 TEX. HISP. J.L. & POL'Y 45, 54-55 (2005) (noting the "pervasive societal narrative that constructs an expanding notion of unworthiness and 'illegality' regarding undocumented immigrants and a diminished popular sense regarding the availability of protection from prejudice and discrimination"); see also *Shell Games: The "Minutemen" and Vigilante Anti-Immigrant Politics*, BUILDING DEMOCRACY INITIATIVE: CENTER FOR NEW COMMUNITY (Oct. 2005), <http://www.buildingdemocracy.org/shellgames.pdf> [hereinafter *The Minutemen*] (noting that with regard to immigrants, the gains of the civil rights movement "are under attack"). "[A]nti-immigrant sentiment is sweeping the country like wildfire. Stoked by political successes in and out of the Beltway and fanned by anti-immigrant organizations, nativism has moved from the margins to the mainstream." *The Minutemen*, *supra*.

<sup>345</sup> See Thronson, *supra* note 344, at 55. Even the terminology used to describe undocumented persons is loaded with implications. Throughout this article, I have used the term undocumented immigrant rather than illegal alien. As Dean Kevin Johnson has noted the word "alien" has incredible power:

[It] immediately brings forth rich imagery. One thinks of space invaders seen on television and in movies, such as the blockbuster movie *Independence Day*. Popular culture reinforces the idea that aliens may be killed with impunity and, if not, "they" will destroy the world as we know it. Synonyms for alien have included "stranger, intruder, interloper, . . . outsider, [and] barbarian," all terms that suggest the need for harsh treatment and self-preservation. In effect, the term alien serves to dehumanize persons. We have few, if any, legal obligations to alien outsiders to the community, though we have obligations to persons. Persons have rights while aliens do not.

Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 272 (1997) (internal citations omitted). "[Eighty-seven] members of the House of Representatives and one member of the Senate received an 'A' grade in the 110th Congress from the hard-line anti-immigrant organization Federation for American Immigration Reform . . . , labeled a hate group by the Southern Poverty Law Center." Press Release, Am. Voice, *Anti-Immigrant Members of Congress Hypocritical on Worker Prot. Issues* (Dec 10, 2009), available at [http://americasvoiceonline.org/press\\_releases/entry/anti-immigrant\\_members\\_of\\_congress\\_hypocritical\\_on\\_worker\\_protection\\_issues](http://americasvoiceonline.org/press_releases/entry/anti-immigrant_members_of_congress_hypocritical_on_worker_protection_issues); see, e.g., Jeannie Kever, *Toy Drives Insist They Reject No One: Pair of Houston Charities Require Registrants to Show Immigration Status*, HOUSTON CHRON., Dec. 2, 2009, at B1. (de-

elected because of their anti-immigrant rhetoric, pro-immigrant businesses are boycotted, and anti-immigrant vigilantes are treated as heroes.<sup>346</sup> Consequently, the difficulty for undocumented immigrant parents facing a fitness determination is not only that they often lack many of the culturally biased attributes of good parents, but that they may also be subject to the proliferating negative views of undocumented immigrants.<sup>347</sup> Additionally, because the language, culture, and values associated with undocumented immigrants are openly considered undesirable, many may believe that preventing parents from passing these attributes to their children are in the children's best interests.<sup>348</sup> Courts and child welfare agencies routinely express concerns regarding the

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scribing a Toys for Tots program's requirement of a valid social security number to receive toys).

<sup>346</sup> See, e.g. Suzy Khimm, *Run For The Border; Steve King's Coming!*, MOTHER JONES, (Nov. 10, 2010, 3:00 AM PST), <http://motherjones.com/politics/2010/11/steve-king-immigration-committee> (describing two of the most anti-immigrant congressmen); *Working to Stop Illegal Immigration*, NAT'L ILLEGAL IMMIGR. BOYCOTT COALITION, <http://www.illegalimmigrationboycott.com/> (last visited Nov. 20, 2011). For example, The National Illegal Immigrant Boycott Coalition is a political action group created solely for the purpose of boycotting "corporations that support illegal immigration." See *Americans Working to Stop Illegal Immigration*, *supra*; see also *The Minutemen*, *supra* note 344 (describing the "Minutemen Project" which consists of "armed anti-immigrant vigilantes conducting their own 'patrols'") The report notes:

After their highly publicized "maneuvers" in April in Arizona, the Minutemen Project has spawned at least forty new groups in more than a dozen states. In October, Minutemen groups are preparing events in several new states. Attracting volunteers and well-wishers from all over the country, the Minutemen are the latest and largest in a string of vigilante efforts to "secure" the border against the entry of undocumented immigrants.

See *The Minutemen*, *supra* note 344.

<sup>347</sup> See Appell, *supra* note 126, at 759; Johnson, *supra* note 345, at 272. "[W]e have in this country a long and continuing history of constructing the ideal of 'mother' according to skin color, religion, culture, national origin, language, ethnicity, class and marital status." Appell, *supra* note 126, at 759. Mothers who do not meet these norms are most likely to lose their motherhood. See *id.*

<sup>348</sup> See Appell, *supra* note 126, at 760 ("Women who are compliant, English-speaking, not ethnically diverse, White, and middle class are most successful in the child welfare system; those who diverge from these norms are [the] most likely to lose their motherhood. When mothers lose their children, they lose their chance to pass on their language, culture, and values [to] their children."); see also *Santosky* 455 U.S. at 763 (noting that "parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias") (internal citations omitted); David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165, 1204 (2000) (noting that "family courts can be remarkably parochial and uninformed regarding issues of, and related to, immigration status and life in other countries").

language, values, and lifestyle of undocumented immigrants in immigrant parent termination cases.<sup>349</sup>

Given the dangers of best interest analyses, any reliance on them to remove immigrant children from parents should raise concerns.<sup>350</sup> Before a best interest standard, and its attendant weaknesses, is permitted to replace the fitness standard, there must be a clear statement that this is an intended and desired change.<sup>351</sup> Replacing parental rights with a best interest test is an important reversal that must not occur unnoticed and unconsidered.

## VI. PUBLIC SENTIMENT

History has demonstrated that determining a child's best interest is subjective and can be susceptible to bias.<sup>352</sup> Thus, even if the decision to place a child's best interest above parental rights is good in theory, its actual implications are unclear. What is clear, however, is that until there is widespread recognition of the fact that a best interest analysis is being used to justify removals and terminations within undocumented families, there can be no meaningful evaluation of the benefits or detriments of continuing such actions.

Support for these terminations cannot be assumed. The public reaction to some of the more publicized terminations creates doubt as to whether they are publicly supported.<sup>353</sup> For example, when Bathezar-

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<sup>349</sup> See *Santosky*, 455 U.S. at 763.

<sup>350</sup> See *id.* at 760; see also Zug, *supra* note 15, at 1181–82.

<sup>351</sup> See Zug, *supra* note 15, at 1181–82. For example, the removal of immigrant children may result in long-term foster care rather than adoption. See, e.g., Tracy Vericker et al., *Latino Children of Immigrants in the Texas Child Welfare System*, 22 PROTECTING CHILD., 20, no. 2, 2007 at 29–31 (finding that Latino Immigrant Children were more likely to be placed in group homes and institutes and have case goals such as long term family foster care and independent living). But see Maldonado, *supra* note 81, at 1423 (noting that while most Americans “prefer to adopt white children, many are willing to accept Asian or Latin American children if they cannot adopt a white child or the wait is too long”). In fact, “81% of all foreign-born adoptees in the United States[] come from Asia or Latin America . . . .” *Id.* at 1432. Foreign adoptions, however, are difficult: in some instances, “Americans have completed an adoption in the foreign country only to learn that the child will not be allowed entry into the United States because he or she does not satisfy the definition of an ‘orphan’ under our immigration laws.” *Id.* at 1445–46. The adoption of Hispanic immigrant children therefore has two “advantages” that may make them more desirable as potential adoptees. See *id.* at 1425, 1442. First, they are not black, and second, there is little likelihood of the parent reappearing in the child's life at a later date. See *id.*

<sup>352</sup> See Appell, *supra* note 126, at 759.

<sup>353</sup> See Shelia Byrd, *Mexican Immigrant Gets Baby Back from State*, NATIVE AM. TIMES (Feb. 22, 2010), available at <http://www.nativetimes.com/news/international/3134-mexican-immigrant-gets-baby-back-from-state>.

Cruz lost custody of her daughter due to her lack of English proficiency, the public loudly disapproved of the state's actions.<sup>354</sup> This reaction led not only to the return of Bathezar-Cruz's daughter, it also resulted in a potentially significant policy change.<sup>355</sup> After the baby's return, Mexico and the State of Mississippi entered into a Memorandum of Understanding.<sup>356</sup> Under the agreement, any time the Mississippi Child Welfare Services takes a Mexican minor into custody, it agrees to notify the Mexican consulate, consider relative placement—including placement in Mexico, request foreign home studies, and “assist Mexican nationals with obtaining permission to cross the border for court hearings and related re-unification activities.”<sup>357</sup>

On the other hand, in the case of Anna Mae He, which concerned a young girl caught in a custody battle between her American foster parents and Chinese biological parents, there was significant public support for the judge's decision to keep her with her foster family.<sup>358</sup> Although some objected to the decision, others commended the judge for standing up to “the liberals’ to ensure the best interests of the child.”<sup>359</sup>

Also telling is proposed national legislation, such as The Humane Enforcement and Legal Protections for Separated Children Act (“the HELP Act”) and The Immigration and Oversight Fairness Act of 2009.<sup>360</sup> Congress proposed the HELP Act to enable detained, deportable parents to maintain contact with their children in the United States.<sup>361</sup> The HELP Act would provide nationwide protocols to help

<sup>354</sup> See Goel, *supra* note 279, at 528; Byrd, *supra* note 353.

<sup>355</sup> See Byrd, *supra* note 353.

<sup>356</sup> See *id.*

<sup>357</sup> See Byrd, *supra* note 358; DEP'T OF HUMAN SERVS. DIV. OF FAMILY & CHILDREN'S SERVS., STATE OF MISS., ANNUAL PROGRESS AND SERVICES REPORT 49 (2011), *available at* <http://www.mdhs.state.ms.us/pdfs/fcs-apr2010.pdf>. Other states have entered into similar agreements. See, e.g., Memorandum from Erwin McEwen, to Rules & Procedures Bookholders & Child Protective & Child Welfare Staff (May 16, 2008), *available at* [http://www.state.il.us/DCFS/docs/policyGuides/Policy\\_Guide\\_2008.02.pdf](http://www.state.il.us/DCFS/docs/policyGuides/Policy_Guide_2008.02.pdf).

<sup>358</sup> See Goel, *supra* note 279, at 528 (discussing the public reaction to the He decision).

<sup>359</sup> *Id.*

<sup>360</sup> See Press Release, First Focus Campaign for Children, Senate Legislation Protects Children and Families Impacted by Immigration Enforcement (June 22, 2010), *available at* <http://www.ffcampaignforchildren.org/news/press-releases/senate-legislation-protects-children-and-families-impacted-by-immigration-enforc> (hereinafter Press Release, Campaign for Children); Press Release, First Focus, Woolsey, Roybal-Allard Discuss Legislation to Mitigate the Impact of Immigration Policy on Children (Nov. 5, 2009), *available at* [http://www.firstfocus.net/news/press\\_release/woolsey-roybal-allard-discuss-legislation-mitigate-impact-immigration-policy-chil](http://www.firstfocus.net/news/press_release/woolsey-roybal-allard-discuss-legislation-mitigate-impact-immigration-policy-chil) (hereinafter Press Release, Woolsey).

<sup>361</sup> See Press Release, Campaign for Children, *supra* note 360.

keep children with their parents while the parents' cases are pending.<sup>362</sup> It recognizes the difficulties faced by detained and deported parents. Furthermore, it would ensure regular communication between parents and their children, and help detained individuals live with their families while their cases are pending.<sup>363</sup> Similarly, the proposed Comprehensive Immigration Reform for America's Security and Prosperity Act of 2009 would permit immigration judges to prevent the deportation of a parent of a U.S. citizen child if removal is not in the child's best interest.<sup>364</sup>

These pieces of legislation demonstrate support for immigrant family reunification.<sup>365</sup> The proposed bills encourage immigrant family reunification and appear to be at odds with the trend toward increasing the separation of immigrant families.<sup>366</sup> At the same time, the lack of traction of these measures in Congress casts doubt on the public's commitment to stopping immigrant family separations.<sup>367</sup> It is impossible to discern a clear policy or even attempt to accurately gauge public sentiment on the issue of immigrant family separations.<sup>368</sup> It might be that the majority of Americans would object to such parental termination cases. Without more attention given to this issue or a clear policy statement against such removals, however, it is likely that the removal of children from their undocumented parents will continue to take place.

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<sup>362</sup> See *id.*

<sup>363</sup> Press Release, Woolsey, *supra* note 360.

<sup>364</sup> See H.R. 4321, 111th Cong. §§ 1, 187 (2009); *Comprehensive Immigration Reform ASAP*, NYS IMMIGRANT ACTION FUND, <http://nysiaf.org/legislation/comprehensive-immigration-reform-asap> (last visited Nov. 21, 2011).

<sup>365</sup> See Press Release, Campaign for Children, *supra* note 360; Press Release, Woolsey, *supra* note 360; *Comprehensive Immigration Reform ASAP*, *supra* note 364.

<sup>366</sup> See Press Release, Campaign for Children, *supra* note 360; Press Release, Woolsey, *supra* note 360; *Comprehensive Immigration Reform ASAP*, *supra* note 364. A similar piece of proposed legislation is the Immigration and Oversight Fairness Act of 2009, which would provide better treatment to detainees. See Press Release, Congresswoman Lucille Roybal-Allard, Congresswoman Roybal-Allard (CA-34) Introduces Legislation to Ensure the Humane Treatment of Immigration Detainees (Feb. 26, 2009), available at <http://roybal-allard.house.gov/News/DocumentSingle.aspx?DocumentID=126158>. This bill would establish legally enforceable detention standards but also increase the use of alternatives to detention for individuals such as pregnant women, asylum seekers and families with children. See *id.* These individuals would be placed in programs of supervised release rather than detention. See *id.* For families with children, this would prevent initial separation in many cases as well as create the possibility of reunification in situations where the children have been removed. See *id.*

<sup>367</sup> See, e.g., HELP Separated Children Act, H.R. 2607, 112th Cong. (2011); H.R. 4321.

<sup>368</sup> See Tara Bahrapour, *More Laws are Enacted to Help, Not Restrict, Illegal Immigrants*, WASH. POST, May 11, 2010. This is perhaps not surprising given that U.S. Immigration policy in general is mixed. See *id.* The Arizona immigration laws demonstrate one extreme; a study by the Woodrow Wilson International Center for Scholars, however, reveals that more laws are passed nationwide that expand immigrant rights than contract them. See *id.*

## CONCLUSION

The decades-long struggle between children's and parents' rights is continuing. The ascendancy of children's rights has had far reaching effects and the termination of undocumented immigrant parents' rights is one of the most recent but least noticed. Best interest considerations may justify these terminations. Permitting such considerations to support the termination of fit parents' rights, however, represents a substantial law and policy change. This change must be recognized and its implications considered before it is permitted to continue.



